APPENDIX A

Filed July 14, 1967

MAXEY HART, Clerk

By /s/ Elizabeth J. Hubble, Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

CIVIL ACTION
NO. 66-125-EP

BRASWELL MOTOR FREIGHT LINES, INC., AND CLARINDA K. SHAYLER, INDIVIDUALLY AND AS EXECUTRIX AND SOLE DEVISEE OF THE ESTATE OF WARREN G. SHAYLER, DECEASED, PLAINTIFFS,

VS.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS,

AND

TRANSCON LINES, A CORPORATION, PACIFIC INTERMOUNTAIN EXPRESS CO., DC INTERNATIONAL, INC., WATSON-WILSON TRANSPORTATION SYSTEM, INC., RINGSBY TRUCK LINES, INC., IML FREIGHT, INC., CONSOLIDATED FREIGHT-WAYS CORPORATION OF DELAWARE, ILLINOIS-CALIFORNIA EXPRESS, INC., INTERVENORS.

Judgment

Before THORNBERRY, Circuit Judge, United States Court of Appeals, SUTTLE and GUINN, District Judges.

GUINN, District Judge.

We adopt the Statement of the Case as set out in the Joint Brief of the United States of America and the Interstate Commerce Commission.

STATEMENT OF THE CASE

This is an action brought to set aside in part a report and order of the Interstate Commerce Commission, Division 3, entered December 20, 1965, in Docket No. MC-F-8358, *Braswell Freight Lines, Inc.—Purchase —Warren G. Shayler, W. Thurman Shayler, Guardian (Clarinda K. Shayler, Executrix)*, 101 M.C.C. 1, and an order of the Commission, Division 3, acting as an Appellate Division, of July 19, 1966, which denied a petition for reconsideration and/or further hearing. In the report and order of December 20, 1965, the Commission found that the purchase by Braswell Motor Freight Lines (Braswell) of the operating rights of Warren G. Shayler, W. Thurman Shayler, guardian (Clarinda K. Shayler, Executrix) (Shayler rights) pursuant to Section 5(2)(a) of the Interstate Commerce Act (Act), 49 U.S.C. § 5(2)(a), would be consistent with the public interest. However, the Commission made its approval subject to the following restriction: "***provided, however, that the operating authority acquired from Warren G. Shaylor, W. Thurman Shayler, guardian (Clarinda K. Shayler, execu-

trix) shall not be combined or joined with any other authority presently held by Braswell Motor Freight Lines, Inc., for the purpose of providing single-line service to or from points in Arizona and California; ***" (101 M.C.C. 18). Plaintiffs' challenge is, therefore, limited to the validity of this joinder restriction.

We accept as the question presented for our determination the following: Whether the Commission's conclusion (101 M.C.C. 1, 17-18) that the Braswell acquisition of the Shayler rights was consistent with the public interest subject to a restriction against use of the unified rights for the providing of single-line service to and from points in Arizona and California is supported by adequate findings based upon substantial evidence and is in accord with the applicable law.

STATUTES INVOLVED

Section 5(2)(a)(i) of the Act, 49 U.S.C. §5(2)(a)(i), sets forth the basic permissibility for one carrier to acquire control of another carrier:

> (2)(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—
>
> (i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control

of another through ownership of its stock or otherwise; * * *

Section 5(2)(b), 49 U.S.C. § 5 (2). (b), sets forth procedures and standards:

> (b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the person specified in section 205(e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; * * * If the Commission finds that subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: * * *

Section 5(13), 49 U.S.C. § 5(13), defines "carrier" as including a motor carrier:

> (13) As used in paragraphs (2) to (12), inclusive, the term "carrier" means * * * a motor carrier subject to part II; * * *

Section 210a(b), 49 U.S.C. § 310a(b), permits the granting of temporary authority:

> (b) Pending the determination of an application filed with the Commission for approval of a consolidation or merger of the properties of two or more motor carriers, or of a purchase, lease, or contract to operate the properties of one or more carriers, the Commission may, in its discretion, and without hearings or other proceedings, grant temporary approval, for a period not exceeding one hundred and eighty days, of the operation of the motor carrier properties sought to be acquired by the person proposing in such pending application to acquire such properties, if it shall appear that failure to grant such temporary approval may result in destruction of or injury to such motor carrier properties sought to be acquired, or to interfere substantially with their future usefulness in the performance of adequate and continuous service to the public.

It is undisputed that the order of the Commission lies within the scope of its statutory authority. If the order is based upon adequate findings which are supported by substantial evidence, it must be upheld even though we might reach a different conclusion on the facts presented. *Rochester Telephone Corporation v. U. S.*, 307 U.S. 125, 138-140 (1939). The scope of the judicial review of orders of the Commission was recently passed upon in the Western District in the case of *Alamo Express, Inc. v. United States*, 239 F. Supp. 694, affirmed, 382 U.S. 19 (1965), wherein it is stated: "Our duty is to determine whether the conclusions of the Commission find support in the record as

a whole . . . even though the Court would justifiably have made a different choice had the matter been before it de novo'." See also *C & H Transportation Co. v. United States*, 249 F. Supp. 97. The wisdom and experience of the Commission, not of the Courts, must determine the matters involved on appeal.

Likewise, it is the exclusive province of the Commission to make findings of fact, to draw legitimate inferences therefrom, and to evaluate and determine the weight to be given conflicting evidence. *United States v. Chicago Heights Trucking Co.*, 310 U.S. 344, 352-353. There is a presumption that the Commission has properly performed its official duties and this presumption supports its acts in the absence of clear evidence to the contrary. *Interstate Commerce Commission v. Jersey City*, 322 U.S. 503, 512.

We affirm the Commission's finding that the transaction, in general, would be consistent with the public interest. Since substantial evidence in the record shows that under temporary authority Braswell had been using the Shayler rights to provide a new transcontinental traffic for which no public need was established, we also affirm the joinder restriction imposed by the Commission.

We find that the evidence before Division 3 established the fact that the service proposed by Braswell from and to points in Arizona and California would constitute a new service not heretofore performed by vendor in conjunction with vendee or any other carrier. An analysis of this record appears in the Commission's report (101 M.C.C. 1, 14-16).

The evidence supports the finding of the Commission that Braswell, acting under temporary authority, had built a substantial operation to and from California during the six-month period from March 20 through September 30, 1963. Because of its strong financial condition and ability to perform a single-line service to and from points in the vendor's territory, it could reasonably be expected to continue and in all likelihood to increase the amount of traffic handled under the temporary permit.

It is clear that in a Section 5(2) case involving a proposed new service, the applicant must show a public need for the service proposed. Otherwise, existing services are entitled to protection from the establishment of additional competition. This rule certainly applies to this case and there must be an equivalent of the showing of public convenience and necessity where an applicant seeks new operating authority in a Section 207 proceeding. Since the public interest requires that carriers already in a territory be protected, it is immaterial whether the attempt to invade is made through an application under Section 5 or one under Section 207. *Pacific Intermountain Express Co., etc.*, 57 M.C.C. 341 at 380 (1950), affirmed, 57 M.C.C. 467 (1951).

The most important issue involved in this case is not whether the protestants showed that an unrestricted approval of the acquisition by Braswell would have a materially adverse effect on their operations but whether Braswell proved a public need for the new service. The finding of the Commission that it failed

to do so is supported by substantial evidence. (101 M.C.C. 1, 17). There was no evidence of the inadequacy of existing service.

Braswell alleges that the Commission erred in denying its petition for reconsideration and further hearing. Plaintiff sought a further hearing in order to produce evidence of representative transcontinental shipments it made through the Oklahoma City, Tulsa, and Memphis gateways in 1962 and 1963. This evidence was available to plaintiff at all times and could have been produced at the original hearing; further, it did not appear to be of particular relevance to the issue of whether plaintiff was providing a new competitive service between Arizona and California. We find no error in the denial of the petition for further hearing. It is well settled that petitions for rehearing or further hearing are addressed to the discretion of the administrative agency and that denial of such petitions is not open to question unless in clear abuse of discretionary authority. *United States v. Pierce Auto Freight Lines*, 327 U.S. 515, 535. In this case there was not an abuse of discretion.

Plaintiff attaches great importance to the manner in which the Commission reversed the trial examiner. In the final analysis, it is the obligation and duty of the Commission to make its decisions and in so doing it is free to accept or reject the recommendations of its examiners. Administrative Procedure Act, Section 8(a), 5 U.S.C. § 557(c); *Norfolk Southern Bus Co. v. United States*, 96 F. Supp. 756, 758 (E. D. Va. 1950),

affirmed, 340 U.S. 802; *Universal Camera Corp. v. NLRB*, 1950, 340 U.S. 474, at 496.

The complaint of the long delay in completing the case is without merit and could in no sense affect Braswell's rights. The temporary permit was requested with the knowledge that necessarily an indefinite period of time would elapse before final disposition. Braswell could not acquire greater authority by operating under this temporary permit than it was entitled to under the original application.

All points raised by plaintiff not touched upon herein are found to be without merit. We affirm the order of the Commission and the temporary restraining order is dissolved.

/s/ Ernest Guinn
UNITED STATES
DISTRICT JUDGE

United States of America }
Western District of Texas } ss.

I, MAXEY HART, Clerk of the United States District Court for the Western District of Texas, do hereby certify that the annexed and foregoing is a true and full copy of the original JUDGMENT and OPINION

in

NO. CIV-66-125-EP

styled:

BRASWELL MOTOR FREIGHT LINES, INC., et al

-vs-

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION

and

TRANSCON LINES, CORP., et al.

now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at El Paso, Texas this 9th day of October, A.D. 1967,

MAXEY HART,
Clerk.
By Pauline G. Silvers
Deputy Clerk.

[SEAL]

APPENDIX B

MF-2915 *Served December 30, 1965*

INTERSTATE COMMERCE COMMISSION REPORTS—MOTOR CARRIER CASES

NO. MC-F-8358[1]

BRASWELL FREIGHT LINES, INC.-PURCHASE-WARREN G. SHAYLER, W. THURMAN SHAYLER, GUARDIAN (CLARINDA K. SHAYLER, EXECUTRIX)

Decided December 20, 1965

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1. In No. MC-F-8358, purchase by Braswell Motor Freight Lines, Inc., of the operating rights of the estate of Warren G. Shayler, deceased, from Clarinda K. Shayler, executrix and sole devisee of said estate, and acquisition by J. V. Braswell of control of the operating rights through the purchase, approved and authorized, subject to conditions.

2. In Finance Docket No. 22543, application of Braswell Motor Freight Lines, Inc., to issue an unsecured note in the amount of $200,000, bearing interest at the rate of 4 percent per annum, dismissed.

M. Ward Bailey and *Dean Williamson*, for applicants.

Adolph J. Bieberstein, Richard H. Champlin, Morris

[1]This report embraces Finance Docket No. 22543, Braswell Freight Lines, Inc.—Notes.

G. Cobb, Donald L. Cooper, Wentworth E. Griffin, G. F. Gunn, Jr., O. Russell Jones, Robert M. Kaske, Hugh T. Matthews, Lloyd M. Roach, Phillip Robinson, James M. Doherty, Carl L. Steiner, F. J. Steinbrecher, and *Robert W. Wright, Jr.*, for protestants.

L. N. D. Wells, Jr., for labor organization protestants.

Report of the Commission

Division 3, Commissioners Tuggle, Walrath, and Goff

Walrath, *Commissioner:*

Exceptions to the report and recommended order of the examiner were filed by class I rail carriers in the western district, Central Conference of Teamsters and Teamsters Local Union No. 710, and certain protestants,[2] and applicants replied. Our conclusions differ from those of the examiner.

Braswell Freight Lines, Inc.,[3] of El Paso, Tex., and

[2]Western Gillette, Inc. (jointly with rail protestant), Transcon Lines, Roadway Express, Inc., Illinois-California Express, Inc., Consolidated Forwarding Co., Inc., jointly by Viking Freight Company and Be-Mac Transport Co., Inc., and jointly by Denver-Chicago Trucking Co., Inc., Watson-Wilson Transportation System, Inc., Texas-Arizona Motor Freight, Inc., Ringsby Truck Lines, Inc., Pacific Intermountain Express Co., Consolidated Freightways Corporation of Delaware, Missouri Consolidated Freightways, and Interstate Motor Lines, Inc.

[3]In No. MC-8655, *Braswell Motor Freight Lines, Inc.-Merger-Braswell Freight Lines, Inc.*, decided May 5, 1964, (not printed), merger of Braswell Freight Lines, Inc., into Braswell Motor Freight Lines, Inc., for ownership, management and operation, and the acquisition by J. V. Braswell, of control of the operating rights and properties through the merger were approved and authorized, and by supplemental order, in the title proceeding, dated July 16, 1964, Braswell Motor Freight Lines, Inc., was substituted as vendee, in lieu of Braswell Freight Lines, Inc., and as lessee of the properties of vendor under section 210a(b). Reference herein to vendee will be to Braswell Motor Freight Lines, Inc.

Warren G. Shayler, W. Thurman Shayler, guardian (Clarinda K. Shayler, executrix), of Oklahoma City, Okla., by a joint application filed February 11, 1963, as amended, seek authority under section 5 of the Interstate Commerce Act, for the purchase by the former of the interstate operating rights of the latter for $250,000. J. V. Braswell, also of El Paso, who controls vendee through ownership of 99.89 percent of its outstanding capital stock, seeks authority under the same section to acquire concurrent control of the operating rights through the purchase.

By a separate application filed April 1, 1963, in Finance Docket No. 22543, vendee seeks authority under section 214 to issue an unsecured promissory note payable in 5 equal annual installments with interest at 4 percent per annum in the principal amount not exceeding $200,000. At the hearing vendee requested authority to amend the application under section 5 to show that payment would be in cash, and dismissal of the application under section 214. The requests will be granted, and no further reference need be made to the section 214 application.

A hearing has been held, at which the protestants shown in footnote 2 and Campbell Sixty Six Express, Inc., East Texas Motor Freight Lines, Inc., Fortier Transportation Company, General Expressways, Inc., Knox Motor Service, Inc., Lee Way Motor Freight, Inc., Navajo Freight Lines, Inc., Southwestern Transportation Company, and Voss Truck Lines, Inc., opposed the application. Applicants operate in excess of 20 motor vehicles in interstate or foreign commerce.

The findings of fact, insofar as they relate to the financial condition of applicants, the terms of the proposed transaction, and the operations of protestants, as set forth in the examiner's report, are adopted as our own without being restated, except to the extent necessary for clarity of discussion.

Pursuant to authority granted under section 210a (b) on February 25, 1963, as extended by order of July 17, 1963, vendee leased the operating rights of vendor, pending final determination of the section 5 application, at a monthly rental of $250. Temporary operations were commenced by vendee March 18, 1963.

Vendee operates as a motor common carrier, primarily of general commodities, with exceptions, over a network of regular routes extending from Oklahoma City and Tulsa, Okla., Memphis, Tenn., and New Orleans, La., to Los Angeles, Calif., serving such points as Jackson, Natchez and Vicksburg, Miss., Baton Rouge, Monroe and Shreveport, La., Dallas, Fort Worth, Houston, San Antonio and El Paso, Tex., and Phoenix, Tucson and Yuma, Ariz. In *Braswell Freight Lines, Inc., Extension-Atlanta*, 95 M.C.C. 457, decided July 1, 1964, vendee was authorized to transport general commodities, with exceptions, over regular routes, between Jackson, Miss., and Atlanta, Columbus, and Rome, Ga., serving all intermediate points, including Birmingham and Montgomery, Ala. On July 19, 1965, this proceeding was reopened for reconsideration on the present record. It also has an application pending seeking authority to operate over a direct route between Houston and New Orleans.

Vendor operates as a motor common carrier, over irregular routes, of general commodities, with exceptions, (1) from Oklahoma City and points in Oklahoma within 125 miles thereof to points in the St. Louis, Mo.-East St. Louis, Ill. commercial zone, and the Chicago, Ill. commercial zone, (2) from points in that part of Illinois bounded on the west by Illinois Highways 26, 2 and 88, U. S. Highway 34, Illinois Highway 78 and U. S. Highway 67, on the south by Illinois Highway 9, U. S. Highway 54, Illinois Highway 48 and U. S. Highway 67, on the east by the Illinois-Indiana State line and Lake Michigan, and on the north by the Illinois-Wisconsin State line, to points in Oklahoma, (3) from points in Indiana within the Chicago commercial zone, to points in Oklahoma, and (4) from points in the St. Louis-East St. Louis commercial zone, except points in Illinois within said zone which are located on and north of U. S. Highway 66, to Oklahoma City and points in Oklahoma within 125 miles thereof. It is also authorized to transport carbide, over irregular routes, from Keokuk, Iowa to points in Oklahoma.

In recommending approval of the transaction, subject to a condition requiring cancellation of certain dormant portions of vendor's operating rights, the examiner found (1) that the purchase price is reasonable, (2) that vendee should have no financial difficulty in consummating the transaction, (3) that except for traffic originating in Cook, DeKalb, DuPage, Kane, Lake, Madison, and Will Counties, Ill., and that portion of Illinois in the St. Louis commercial zone, vendor's operating rights from points in Illinois are

dormant and should be cancelled, (4) that reasonably continuous and adequate service was rendered under all other portions of vendor's operating rights, (5) that interchange between vendor, vendee, and others, while not large, has not been of such insufficient volume to find that a new service would be created as a result of unification of the operations, or to warrant the imposition of a restriction on the unified rights, (6) that there is no evidence of conversion of the irregular-route operations of vendor to regular-route under the temporary operations of vendee, (7) that there is no evidence of the diversion of a substantial amount of traffic to the vendee, and (8) that the former employees of the "Shayler operation" were not adversely affected as a direct result of the purchase of the operating rights of vendor.

Protestants, in their exceptions, assert that this transaction involves the purchase, by a carrier that has suffered continuous losses, of operating rights which have likewise been conducted at a loss, for $250,000; that the record does not show the source of value on which the purchase price was predicated, but does show that for the first 9 months of 1963, including the operation of vendor under temporary authority for 6 months, vendee suffered an operating loss of $201,866; and that based on the operating histories of applicants the purchase price is wholly unrealistic; and cannot be sustained as reasonable. Protestants contend that vendee under temporary authority is already conducting a service tantamount to regular-route service, and has instituted a trend which will inevitably result in a regular-route operation

utilizing the irregular-route rights of vendor. They argue that vendee has been providing a daily service, and is soliciting traffic on the basis of a daily pickup at St. Louis; that exhibits submitted at the hearing covering vendee's operations under temporary authority show that daily service has been rendered; and that trucks have been dispatched on a daily basis from Oklahoma City to St. Louis and Chicago almost without exception. Although the same type exhibit was not furnished covering shipments in the reverse direction, out of St. Louis and Chicago, since freight was picked up daily at those points, and trucks were coming back every day, they deemed it reasonable to assume that freight was also dispatched out of St. Louis and Chicago on a daily basis, arguing in support of such assumption that "what goes up must come down"; otherwise all of the trucks would end up in Chicago. They also argue that the new operation will be completely intertwined with the present operation of vendee, and soon, if not already, the two will be indistinguishable. They further assert that the interested shippers presently have service on a daily basis with expeditious movements between points in vendee's present territory, on the one hand, and St. Louis and Chicago, on the other, and that such parties are not interested in vendee rendering a once- or twice-a-week service on a spasmodic call-on-demand, "catch as catch can" basis for less-than-truckload traffic; that none of the shipper witnesses would so testify, and none did; and that shippers of less-than-truckload freight want daily, expeditious, dependable, regular service, which is exactly the type of service vendee would have to give them to

operate successfully in vendor's territory.

Protestants also contend that the examiner's finding of dormancy did not go far enough to encompass all of the actual dormancy, and argue that approximately 95 percent of vendor's southbound traffic was delivered at Oklahoma City and Tulsa, with the remaining 5 percent, mostly truckload traffic, destined to a limited number of points, and that no need has been shown for the reactivation of any dormant portions of vendor's operating rights, which the examiner recommended be cancelled.

Protestants further assert that neither vendee nor vendor, singly or in combination, were considered competitive to or from any Illinois point or St. Louis, and argue that vendor's local service operations, handling traffic almost exclusively to and from Oklahoma and Texas would be expanded into a single-line transcontinental operation connecting Chicago and St. Louis with the Pacific coast area, Phoenix and Tucson, Ariz., El Paso, Tex., and numerous southern traffic centers; that there is an abundance of available single-line or single-system carriers competing for traffic between all of the important traffic centers affected by this proposal, and approval here would place in existence an entirely new and additional competitive operation in traffic fields already overcrowded. They also urge that the examiner was impressed more by the number of witnesses than by what they said; that the witnesses offered by applicants failed to establish any inadequacy in the presently available service or to demonstrate any real need for the operation proposed by vendee; and that, in fact, most witnesses expressed

satisfaction with existing service including that of protestants, and were more interested in vendee's lower rates and the fact that its nonunion drivers would cross picket lines.

Protestants maintain that there was a startling change in the pattern of operations subsequent to the commencement of temporary operations by vendee, which bore no resemblance to the operations conducted prior thereto; that the increased traffic now being handled by vendee has been diverted from existing carriers to the point where vendee is now a strong competitive factor in traffic moving between its authorized territory and that of vendor; that the past unprofitable operations of both vendee and vendor can only be made profitable by the conversion of vendor's irregular-route operations to regular-route and the continuing diversion of traffic from existing carriers; and that unless an appropriate restriction against the joinder of the two sets of rights for the purpose of performing a through service is imposed, the unified operations would have no resemblance to the operations heretofore conducted by applicants in conjunction with themselves or with others.

The union takes exception to the examiner's recommended approval of the transaction, in light of his finding that the vendee was only willing to accept the former employees of vendor on a nonunion basis, and contends that this not only constitutes a refusal to protect the employees' interests, but even amounts to active cooperation with vendee in the flouting of the national labor policy, namely that employees shall be protected in the right of self organization, to join,

form and assist labor organizations and to engage in collective bargaining. It asserts that in mid-1962 vendee began negotiations to purchase vendor's operations, but by the contract finally signed on January 28, 1963, ostensibly purchased only the bare operating rights. In this connection, it argues that when the total fact situation, involving as it does the use of the legal device of a lease by the son as guardian to himself as operator, is weighed, it becomes apparent vendor is seeking to obtain $250,000 for the enterprise while leaving the employees unpaid, their pension and welfare trusts likewise unpaid, and relegating creditors to the bankruptcy court. It is to the son that creditors must look, it asserts, while the mother receives a windfall, unencumbered by laborers' liens or other creditors' rights. The Union further asserts that to effectuate this scheme it became necessary to convince the Commission that vendor had no employees, which representation was wholly false, because on February 1, 1963, the date of the application, vendor had a full complement of employees who were not terminated until February 6, 1963. It argues that applicants have, in effect, sought to picture a going enterprise as nothing more than bare operating rights, and seek approval of their transfer while the employees are relegated to the bankruptcy court with claims against an individual who asserts that he has no assets, and that such transactions require the most careful scrutiny in order that public interest may be vindicated, and the Congressional intent, to effect fair and equitable treatment of employees, implemented. The union further urges that it is neither in the public

interest, nor in the interest of the affected employees, to approve a transaction by which a carrier losing money is made profitable at the expense of competing carriers and employees, and argues, that if the transaction is approved it should be conditioned upon payment of the unpaid wages, health, welfare and pension benefits, and conventional protections applied to vendor's employees.

In their reply, applicants contend that the protestants' argument that the purchase price is excessive, in view of applicants' deficit operations, fails to take into consideration the fact that vendee was beset with labor troubles during the years 1960 to 1963, and that vendor had suffered unusual financial difficulties during the last two years of operation. The operating economies which would result from vendee's operation under the vendor's operating rights, they assert, alone justifies the purchase price, not to mention the increase in revenues and earnings that would be realized from the recovery of a portion of the traffic lost by vendor due to acquisitions and mergers by other carriers in the general areas involved. They also assert that until labor problems developed vendee enjoyed extremely profitable operations, and with settlement of those difficulties the profits which will accrue from operations under the unified operating authorities will make the purchase price extremely reasonable; and that payment of the purchase price will not only have no adverse effect upon the capital structure of vendee, but in fact will hardly make a dent in its assets.

In connection with the conversion of vendor's irregular-route authority to regular-route, applicants

argue that in each of the decisions relied upon by protestants the facts are distinguishable. In these cases, the conversion of the irregular- to regular-route operations was inevitable or the vendee expressed an intention, either by the proposed method of operation or by conducting regular-route operations under temporary authority, of making conversion inevitable, or were cases where it was impossible as a practical matter to maintain operations on an irregular-route basis, none of which conditions exists here. They argue that the fact that operations conducted by vendee under the vendor's rights might have some of the characteristics of regular-route operations does not necessarily mean that the general character of irregular-route operations is not being maintained, and point out that during vendee's two years of operations under temporary authority none of the protestants has filed a complaint alleging that it has converted vendor's irregular-route operations to regular-route. They assert that if operating conditions, the flow of traffic, and the general requirements of the public for movement of traffic cause a sufficient drift toward a regular-route operation, vendee would properly apply for authority to convert the acquired operating rights to regular-route authority. They argue that despite the fact that freight bills were cut every day, the evidence indicates that there were several days when no schedules were dispatched and several when more than one schedule was dispatched, all of which points to irregular schedules and irregular service characteristic of irregular-route operations. They further argue that protestants have failed to establish that there has been

or will be an unlawful conversion of vendor's irregular-route operating authority, and that the transaction should not be denied merely because there is involved the acquisition of irregular-route authority which will be tacked to regular-route authority.

On the question of dormancy, applicants assert that vendor performed service coextensive with the scope of the operating authority when traffic was available; and that the evidence clearly indicates that the operations under vendor's authority which the examiner found had not become dormant have been substantial and continuous. They aver that where a carrier has been conducting substantial operations, it need not submit evidence of operations to and from every authorized point to establish that its operations as a whole have been continuing and are of a substantial nature.

It is acknowledged that while the record shows that there were periods in which vendee discontinued part of its interchange relation with vendor because of the latter's financial difficulties, vendor was for several years the principal interchange carrier of vendee on traffic moving to and from points in the vendor's territory and beyond; and protestants would only be faced with the improvement of an existing service rather than a new service. They argue that it is difficult, if not impossible, to conceive that approval of the transaction would have a resulting destructive adverse effect upon protesting carriers when such protestants have been operating in competition with vendee's operations of the unified rights under temporary authority for two years, during which their tonnages and re-

venues have increased and their operating ratios have generally improved.

Applicants also contend that while protestants have submitted some figures on the tonnage subject to diversion they have apparently maintained their level of service and have been able to meet any intensified competition thus far, and there is nothing in the instant record under which the Commission would be justified in imposing a restriction against tacking as to traffic to and from the west coast. They assert that the shipper support of the application was based on a desire for improved service, rather than a desire for lower rates as contended by protestants, and that if shippers and receivers of freight can avail themselves of a carrier offering lower rates, it is in the public interest to enable them to do so through approval of the transaction.

In reference to employees, applicants contend that if vendee is guilty of any unfair labor practice the National Labor Relations Board is the proper place to seek relief for the union employees; that if vendee had taken over the operations of vendor as a going concern there might be some obligation, but it is merely purchasing bare operating rights from their owner and has no obligation to the employees of W. Thurman Shayler, the former lessee, who became bankrupt and terminated such employees; that vendee did not refuse to employ the former employees of W. Thurman Shayler but rather came to a parting of the ways with them when it refused to be saddled with the employment contract entered into by W. Thurman Shayler and the union; and that neither vendee nor

Clarinda K. Shayler had any dealings with the union or the employees and should not be penalized by being held responsible for the legal rights, if any, of the employees against W. Thurman Shayler.

Applicants finally argue that approval of the application would make available an improved single-line and better coordinated service between points in the considered areas, with better tracing and claim service, less handling of traffic, less damage and loss, and reduced exposure to damage and loss; that any traffic diverted from protestants would not impair their efficiency or ability to provide service if they continue to maintain a high level of service; and that the volume of freight handled by vendee under the temporarily unified rights has steadily increased, indicating that the service is fulfilling a desire or need for vendee's service.

Before progressing to other issues we will first dispose of the question concerning employees. The history of vendor's operation was adequately set forth in the examiner's report. However, for the purpose of understanding, it will be briefly restated. In 1946, Warren G. Shayler was declared incompetent; his son, W. Thurman Shayler, was appointed guardian, and conducted his father's motor carrier operation. The elder Shayler was subsequently declared competent, then again incompetent, and on December 15, 1961, passed away. During all this period, W. Thurman Shayler conducted the motor carrier operation, part of the time prior to 1956 with the aid of a partner, but thereafter as an individual, as lessee, from himself, as guardian. By order of December 6, 1961, in No. MC-

FC-35368, W. Thurman Shayler was authorized to extend said lease for an additional period of 5 years, commencing January 8, 1962, at a monthly rental of $1,000. During the year 1962 revenues declined to such a point that W. Thurman Shayler was unable to meet his insurance and lease rental payments. In January 1963, he was notified that his insurance would be cancelled effective February 6, 1963. On January 13, 1963, Clarinda K. Shayler, mother of W. Thurman Shayler, and executrix and sole legatee of the estate of Warren G. Shayler, sought and was granted authority by the appropriate court to cancel the lease held by her son, and to sell or do whatever was necessary to protect the value of the operating rights. On February 4, 1963, Mrs. Shayler notified her son that the lease would be cancelled effective February 6, 1963. On February 5, 1963, W. Thurman Shayler notified the union of his inability to continue the operation, and discontinued operations at the close of business the same day. In June of the same year, W. Thurman Shayler filed a petition in bankruptcy, and listed among the claims of creditors, wages due employees of $12,021, and $4,586 due to the union health, welfare and pension fund.

We have on numerous occasions stated that the act, taken as a whole, makes clear the Congressional intent that public policy demands fair and equitable treatment of employees of motor carriers involved in section 5 proceedings. We cannot accept applicants' argument that the only thing involved here is the purchase of bare operating rights, and that the National Labor Relations Board is the only proper place for the em-

ployees to seek relief from the effects of this transaction. Section 5(2)(c)(4) of the act provides that in passing upon any proposed transaction under the provisions of section 5(2) we shall give weight to the interest of the carrier employees affected. In applying the provisions thereof, jurisdiction has been reserved in a number of instances where doubt existed as to what, if any, adverse effect consummation of the transaction there considered would have upon employees. However, in a number of cases where a definite showing was made that certain employees have been or would be adversely affected as a result of the proposed transaction, we have prescribed conditions for their protection. See *Watkins Motor Lines, Inc.-Control and Merger*, 90 M.C.C. 567, and the cases cited herein.

In response to exhibit D-5 of the application, applicants stated:

> The transferor has no employees. The operations of W. Thurman Shayler under the certificates here involved has or will cease, and all employees will have been discharged. Under all of the circumstances the transaction in itsef will have had no effect upon any employees of W. Thurman Shayler, and, therefore, it is urged that the Commission under section 5 is not required to give weight or consideration to the employees of W. Thurman Shayler.

As indicated above, W. Thurman Shayler conducted operations under the considered rights until their abrupt discontinuance on February 5, 1963, or beyond January 28, 1963, the date of the execution of the

contract of sale between vendee and Mrs. Shayler. Applicants are technically correct in declaring that Mrs. Shayler had no employees. We cannot, however, because of a technicality close our eyes to the fact that there were "carrier" employees involved, and the conclusion is warranted that those employees were adversely affected as a direct result of this transaction. The questions of the contractual obligations of the parties under the union agreement, and as to whether the employees are entitled to payment of unpaid wages, and the union to payment of the health, welfare and pension benefits are properly matters to be determined by the parties or the courts, and a determination of the validity of such claims by this Commission would be improper. However, to the extent that any of the employees of W. Thurman Shayler did not find full-time employment following their dismissal, we are of the opinion that they should be afforded protection in the form of the condition hereinafter imposed.

We find that any employee of W. Thurman Shayler separated from his position on or after January 28, 1963, should receive for the period in which he remained unemployed following the separation, but for a period not to exceed 3 months, severance pay from Clarinda K. Shayler at the rate of his average monthly pay for the 12 months immediately preceding the month in which he was discharged, provided, however, that the severance pay of any dismissed employee who was otherwise employed during the 3-month period shall be reduced by the amount of his total wages earned during the period in such other employment,

including unemployment benefit payments received under any unemployment insurance law. In the event that any dispute or controversy arises with respect to the protection herein afforded which cannot be settled by the parties, it may be submitted to arbitration.

We have on numerous occasions stated that there is no fixed formula for determining whether the purchase price is reasonable. A carrier's earning record is not the sole criterion by which to determine the reasonableness thereof, and this is especially so where, as here, the record indicates that vendor was operating with insufficient capital, which added to operating difficulties, and that vendee was hampered by labor difficulties. Here the vendee would acquire the right to serve a territory including the St. Louis, Mo.-East St. Louis, Ill., and Chicago commercial zones, both densely populated and highly industrialized, and in addition to the traffic it would generate over these new operating rights local to its own lines, it would be in a position to develop interline arrangements with the numerous carriers serving those areas. Exhibit No. 44, submitted at the hearing, indicates that vendee, under temporary authority, during the period of March 20, through September 30, 1963, handled 7,302 shipments, weighing 10,590,266 pounds, from and to points authorized to be served by vendor, and it is reasonable to expect that increased solicitation and familiarization with the territory would enable it to generate additional traffic. The premises considered, we find that the purchase price is neither improvident nor unreasonable.

Protestants' objections to the unification of applicants' operating rights, on the ground that the irregular-route operations of vendor will be converted to a regular-route operation are indeed most strenuous. However, it was stated in *Gordons Transports, Inc.-Control and Merger*, 80 M.C.C. 729, and prior cases, that—

> ***it must be presumed here that applicant, in operating under the unified rights will maintain such operations within the scope of the confirmed operating authority. *Thurston-Purchase-Merritt*, 15 M.C.C. 358. Moreover, until vendee has conducted such unified operations for a period sufficient to permit a determination that they do or do not conform to the operating authority possessed, any conclusion in the premises would be premature.

As in the *Gordons* case, operations under the unified rights here will determine the type of service vendee will provide, and considering that vendee has been conducting operations under the considered rights for over two years, pursuant to temporary authority, without complaint, it must be presumed that the irregular-route operation of vendor has not been unlawfully converted to a regular-route operation. Protestants' argument that vendee's practice of making daily pickups was indicative of the conduct of a daily service is not sustained by an examination of exhibit No. 44, covering vendee's operations under temporary authority. Rather the exhibit discloses that on many of the days covered the aggregate pickup was well below a truckload, and its movement that day would not have

been economically feasible. Vendee is not new to the field of motor carrier transportation, and is aware of the distinction between irregular- and regular-route service, and until concrete evidence to the contrary is presented, we must presume that its operations are being lawfully conducted.

Numerous claims regarding the service or lack thereof by vendor have been advanced, the principal of which is that vendor's operations were limited to service between Chicago, St. Louis, Tulsa and Oklahoma City. The abstract of shipments submitted with the application, covering the months of July and December 1962, and one week in each of the intervening months, lists over 6,000 shipments handled during the period. While merely representative, the abstract covers a sufficient period of time to give a clear picture of the operations performed by vendor, and indicates that a substantial service has been performed to points in and surrounding the Chicago, and St. Louis, Mo.-East St. Louis, Ill., commercial zones and throughout the State of Oklahoma. Ordinarily we withhold approval of the transfer of dormant irregular-route rights, only where the evidence clearly shows that service to or from particular areas has been abandoned or discontinued for substantial periods of time and evidence showing a need for reactivation of the rights by the acquiring carrier is either not presented or if presented, is not convincing. We have, on numerous occasions, stated that an irregular-route carrier is only required to submit evidence showing that it has rendered substantial service to a representative number of points within its authorized territory in order to

support the conclusion that its operations have been substantial and continuous. Compare *New Dixie Lines, Inc.-Control-Jocie Motor Lines, Inc.* 75 M.C.C. 659, and *Virginia-Carolina Frt. Lines, Inc.-Control-Burlington*, 87 M.C.C. 341. In our opinion, the evidence of shipments transported under the rights involved, including, as it does, evidence of shipments in direct service, to or from such diverse points as Alton, East Alton, Collinsville, Genoa, DeKalb, Sycamore, Aurora, Plainfield, Joliet, Frankfort, Batavia, and Wheaton, Ill., and Guymon, Beaver, Elk City, Altus, Temple, Ardmore, Idabel, Broken Bow, Wilburton, Enid, Miami, Wynnewood, Blackwell, Bartlesville, and Muskogee, Okla., as well as numerous other points, is sufficiently representative to show that a substantial and continuous service was performed under such authority throughout Oklahoma, and from points in Cook, DeKalb, DuPage, Kane, Lake, and Will Counties, Ill., and that portion of Madison County, Ill., authorized to be served by vendor.

In establishing the service provided by vendor, the exhibits submitted with the application and at the hearing, clearly depict the operations performed in conjunction with connecting carriers, and the operations which would result from unconditioned approval of the transaction. Exhibit No. B-7 which, as indicated above, covers over 6,000 shipments, shows that vendor handled a total of only 13 shipments which originated at, or were received from connecting carriers at Chicago, Oklahoma City, or St. Louis, having origins or destinations in Arizona and California. Of these, 3 shipments, with an aggregate weight of 14,394 pounds

were destined to California points, 9 shipments with an aggregate weight of 2,982 pounds were originated in California, and one shipment weighing 315 pounds was originated at Tucson, Ariz.

Depicting the traffic interchanged between applicants, exhibit No. 38, shows that for the year 1962 vendor gave shipments totaling 3,704,781 pounds to vendee, and received from vendee shipments weighing 228,466 pounds. Of these, a single shipment weighing 357 pounds was destined to California, 4 shipments with a combined weight of 1,397 pounds originated at Tucson, 6 shipments with a combined weight of 1,212 pounds originated at Phoenix, and 10 shipments with a combined weight of 3,285 pounds originated at California points. These shipments represent the traffic interchanged by applicants during the month of May 1962, (the only month abstracted in the exhibit). However, they represent 23.1 percent of the total traffic given by vendor to vendee, and 18.3 percent of the traffic received from the vendee, for the entire year. The exhibit also shows the traffic interchanged by applicants during the month of September 1960, which indicates that for that month applicants interchanged 10 shipments originated at or destined to points in California, and 3 shipments originated at or destined to points in Arizona. However, this traffic is too remote to merit consideration. See *Illinois-California Exp. Inc.-Pur.-Salt Lake Kanab*, 97 M.C.C. 38. This exhibit further shows that traffic was originated or destined to approximately 123 points in Texas, covering all areas of that State.

Exhibit No. 40, covering approximately 60 days in 1962, (May and June, with some July traffic included) shows that vendor transferred 668,213 pounds of traffic to 22 connecting carriers at Oklahoma City and Tulsa, and received 72,511 pounds from 9 carriers at those points. None of this traffic was originated at or destined to points in Arizona or California.

Exhibit No. 44, depicting the traffic handled by vendee under the vendor's operating authority from March 20, 1963, through September 30, 1963, under temporary authority, shows a startling change in the operating pattern, compared to that previously conducted by vendor, in connection with vendee or with other connecting carriers. This exhibit indicates that during this period vendee transported, under the vendor's operating authority, 3,313 shipments weighing 4,333,739 pounds which originated at or were received from connecting carriers at Chicago; 1,977 shipments weighing 2,914,107 pounds which originated at or were received from connecting carriers at St. Louis; 1,013 shipments weighing 1,919,141 pounds destined to Chicago or points beyond; and 999 shipments weighing 1,423,279 pounds destined to St. Louis or points beyond a total of 4,326 shipments weighing 6,252,880 pounds moving to or from Chicago, and 2,976 shipments weighing 4,337,386 pounds moving to or from St. Louis, or an aggregate total of 7,302 shipments weighing 10,590,266 pounds moving to or from Chicago and St. Louis. Moving from Tucson were 54 shipments with a combined weight of 47,198 pounds to Chicago, and 3 shipments weighing 509 pounds to St. Louis; from Phoenix 8 shipments weigh-

ing 1,638 pounds to Chicago; and 7 shipments weighing 1,286 pounds to St. Louis; from California 225 shipments weighing 55,061 pounds to Chicago and 351 shipments weighing 94,621 pounds to St. Louis. Moving to Tucson were 33 shipments from Chicago and 7 from St. Louis; to Phoenix 106 shipments from Chicago and 2 from St. Louis; to other Arizona points 26 shipments from Chicago and 7 from St. Louis; and to California 383 shipments from Chicago and 47 from St. Louis. Similar to the exhibits covering operations of the vendor, exhibit No. 44 shows a substantial flow of traffic to and from points in Texas.

Contrary to the arguments of certain protestants, the evidence conclusively shows that there have been continuous and substantial operations by applicants in connection with traffic moving from and to points in Texas in conjunction with one another, and with other connecting carriers, and that the single-line service which would be instituted by vendee under the unified rights would be new only to the extent that the former interline with vendor would be eliminated. It is probably true that the unified operation will cause, and the operations under temporary authority no doubt have already caused, some readjustments in the competitive relations of the carriers, and an intensification of competition between points in Texas and points in the territory of vendor, but this almost always occurs when the purchasing carrier is stronger than the selling carrier, and we are not convinced that any of the protestants would be unable to meet the added competition without serious impairment of their existing services. Compare *Interstate Motor Lines*,

Inc.-Control and Merger, 58 M.C.C. 775.

Evidence of the scope of vendor's operations in connection with traffic interlined from and to Arizona and California points indicates that such traffic constituted an infinitesimal part of vendor's total operation, and was of no competitive significance to protestants or other carriers in the area. On the other hand, vendee, in just six months, under temporary authority, has built a substantial operation to and from Arizona and California points, and because of its stronger financial condition, and ability to perform a single-line service to and from points in vendor's territory, can reasonably be expected to continue, and in all likelihood increase, the amount of traffic now being handled under temporary authority. In an attempt to show that protestants will not be adversely affected by the transaction, applicants request that we consider certain data relating to the operations of protestants since the completion of the hearing. This data is not of record and will not be considered in disposing of the issues here present. Compare *Wheaton Van Lines, Inc.-Purchase-Carleton*, 65 M.C.C. 781. It is clear, on the evidence before us, that the service proposed by vendee from and to points in Arizona and California would constitute a new service not heretofore performed by vendor in conjunction with vendee or any other carrier. In the absence of evidence of the inadequacy of existing services, or of a showing of need for the service proposed, protestants are entitled to protection from the establishment of additional competition. Where the institution of a new service is proposed, applicants must show a need therefor, and may

not escape this required showing by contending that protestants have not submitted positive proof of diversion of specific traffic as a result of the proposed transaction. See *North American Van Lines, Inc.-Pur.-Hagerstown Motor*, 93 M.C.C. 125. On numerous occasions we have stated that restrictions on operating rights create undesirable complications, and should be imposed only when the record conclusively shows that a restriction is necessary in the public interest. In our opinion the record here is clear that approval of the instant transaction would have a substantial adverse effect upon existing carriers operating from and to points in Arizona and California, and our findings will be conditioned accordingly. Compare *Consolidated Copperstate Lines-Purchase-Nielsen*, 90 M.C.C. 483. Except for cancellation of those portions of vendor's rights found to be dormant, and the above-mentioned restriction, the evidence establishes that the service proposed by vendee would be consistent with the public interest.

We find, (1) in Finance Docket No. 22543, that the application should be dismissed, and (2) in No. MC-F-8358, that the purchase by Braswell Motor Freight Lines, Inc., of the operating rights of Warren G. Shayler, W. Thurman Shayler, guardian (Clarinda K. Shayler, executrix), and the acquisition by J. V. Braswell of control of the operating rights through the purchase, on the terms and conditions above set forth, and in the examiner's report, which terms and conditions are found to be just and reasonable, constitute a transaction within the scope of section 5(2)(a) of the Interstate Commerce Act, and will be consistent

with the public interest, and that if the transaction is consummated, Braswell Motor Freight Lines, Inc., will be entitled to operate under the rights confirmed in No. MC-70380 and Sub-Nos. 1 and 2, which rights are herein authorized to be unified with rights otherwise confirmed in it, and to be embraced in a certificate to be issued in its name; provided, however, that the operating authority acquired from Warren G. Shayler, W. Thurman Shayler, guardian (Clarinda K. Shayler, executrix) shall not be combined or joined with any other authority presently held by Braswell Motor Freight Lines, Inc., for the purpose of providing single-line service to or from points in Arizona and California; and provided, further, that coincidentally with consummation of the transaction herein authorized, that portion of the operating rights purchased by Braswell Motor Freight Lines, Inc., authorizing the transportation of general commodities, with exceptions, from points within a defined area of Illinois to points in Oklahoma, described in No. MC-70380, shall be cancelled, except to the extent that it authorizes service from points in Cook, DeKalb, DuPage, Kane, Lake and Will Counties, Ill., and that portion of Madison County, Ill., authorized to be served by vendor, to points in Oklahoma; and provided, further, that any employee of Warren G. Shayler, W. Thurman Shayler, guardian (Clarinda K. Shayler, executrix), separated from his position on and after January 28, 1963, shall receive for a period of not more than 3 months, severance pay from Clarinda K. Shayler at the rate of his average monthly pay for the 12 months immediately preceding the month of January 1963,

said payments, however, to be reduced by the amount of his total wages earned during the period in which he was otherwise employed during the 3 months, including unemployment benefit payments received under any unemployment insurance law; and provided, further, that in the event of any dispute or controversy arising with respect to the protection afforded by the foregoing condition, which cannot be settled by the parties, or their authorized representatives, within 30 days after the controversy arises, it may be referred, by either party, to an arbitration committee for consideration and determination, the formation of which committee, its duties, procedure, expenses, et cetera, shall be agreed upon by the parties or their authorized representatives.

An appropriate order will be entered.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D.C., on the 20th day of December A. D. 1965.

No. MC-F-8358

BRASWELL FREIGHT LINES, INC—PURCHASE —WARREN G. SHAYLER, W. THURMAN SHAYLER, GUARDIAN (CLARINDA K. SHAYLER, EXECUTRIX)

Finance Docket No. 22543

BRASWELL FREIGHT LINES, INC.—NOTES

Investigation of the matters and things involved in these proceedings having been made, and said division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report and the report of the examiner, are hereby made a part hereof:

It is ordered, That the application in Finance Docket No. 22543 be, and it is hereby, dismissed.

It is further ordered, That the purchase by Braswell Motor Freight Lines, Inc., of El Paso, Tex., of the operating rights of Warren G. Shayler, W. Thurman Shayler, guardian (Clarinda K. Shayler, executrix), of Oklahoma City, Okla., and the acquisition by J. V. Braswell, also of El Paso, of control of the operating rights through the purchase, be, and they are hereby, approved and authorized, subject to the terms and conditions set out in the findings in said report.

It is further ordered, That, if the parties to the transaction herein authorized desire to consummate same, they shall (1) promptly take such steps as will insure compliance with sections 215, 217, and 221(c) of the Interstate Commerce Act, and rules and regulations, and requirements prescribed thereunder, and (2) confirm in writing to the Commission, immediately after consummation, the date on which consummation has actually taken place.

It is further ordered, That, if the authority herein granted is exercised, Braswell Motor Freight Lines, Inc., shall submit for consideration, a sworn statement, and one copy thereof, showing all expenditures made, by dates, or to be made, in connection with the transaction authorized, including the consideration, legal and other fees, commissions, witness fees, and any other costs incidental to the transaction, the assets acquired, and liabilities assumed, indicating the account number and title to which each item has been, or is to be, debited or credited.

It is further ordered, That the authority herein granted shall not be exercised prior to the effective date hereof, and that this order shall be effective 30 days from the date of service hereof.

It is further ordered, That, unless the authority herein granted is exercised within 90 days from the effective date hereof, this order shall be of no further force and effect.

It is further ordered. That recital in said report of balance sheet and other financial data shall not be con-

strued as approving accounting methods which have been followed, or expenditures represented thereby.

And it is further ordered, That effective with consummation of the transaction herein authorized, or 90 days from the effective date hereof, whichever first occurs, the authority granted by the order of February 25, 1963, as extended by order of July 17, 1963, and amended by supplemental order of July 16, 1964, for temporary operation of the operating rights of Warren G. Shayler, W. Thurman Shayler, guardian (Clarinda K. Shayler, executrix), shall be of no further force and effect.

By the Commission, division 3.

H. NEIL GARSON,
Secretary.

(SEAL)

APPENDIX C

INTERSTATE COMMERCE COMMISSION
Served December 29, 1964

NOTICE TO THE PARTIES

Exceptions, if any, must be filed with the Secretary, INTERSTATE COMMERCE COMMISSION, Washington, D. C., and served on all parties in interest within 30 days from the date of service shown above, or within such further period as may be authorized for the filing of such exceptions. At the expiration of said period for the filing of exceptions, the recommended order will become the order of the Commission and will become effective unless exceptions have been seasonably filed or the order has been stayed or postponed by the Commission. If exceptions are filed replies to exceptions may be filed within 20 days after the final date for filing of exceptions. It should not be assumed that the recommended order has become effective as the order of the Commission until a notice or order to that effect, has been served.

No. MC-F 8358[1]

BRASWELL FREIGHT LINES, INC.—PURCHASE —WARREN G. SHAYLER, W. THURMAN SHAYLER, GUARDIAN (CLARINDA K. SHAYLER, EXECUTRIX)

Decided .....

[1]This report also embraces Finance Docket No. 22543, Braswell Freight Lines, Inc.—Notes.

1. In No. MC-F 8358, purchase by Braswell Motor Freight Lines, Inc., El Paso, Texas, of the operating rights of the Estate of Warren G. Shayler, Deceased, from Clarinda K. Shayler, Individually and as Executrix and sole devisee of said estate, Oklahoma City, Oklahoma, and acquisition by J. V. Braswell of control of the operating rights through the purchase, approved and authorized, subject to condition.

2. In Finance Docket No. 22543, application of Braswell Motor Freight Lines, Inc., to issue an unsecured note in the amount of $200,000, bearing interest at the rate of 4 percent per annum, dismissed.

M. Ward Bailey and *Dean Williamson*, for applicants.

Adolph Bieberstein, Richard H. Champlin, Morris G. Cobb, Donald L. Cooper, Wentworth E. Griffin, G. F. Gunn, Jr., O. Russell Jones, Robert M. Kaske, Hugh T. Matthews, Lloyd M. Roach, Phillip Robinson, Carl L. Steiner, and *Robert W. Wright, Jr.* for protestants.

L. N. D. Wells, Jr., for labor organizations, protestant.

REPORT AND ORDER

RECOMMENDED BY JAMES F. PERRIN, HEARING EXAMINER

By joint application filed February 11, 1963, Bras-

well Freight Lines, Inc.[2] (Braswell Freight), El Paso, Texas, seeks authority[3] to purchase the operating rights of Warren G. Shayler, Deceased (Shayler Rights) from Clarinda K. Shayler, Individually and as Executrix and sole devisee of said estate (seller), Oklahoma City, Oklahoma, for $250,000. By the same application, J. V. Braswell, and Braswell Motor Freight Lines, Inc. (Braswell Motor) seek authority to acquire control of the Shayler Rights through the transaction.

Braswell Freight operates in excess of 20 motor vehicles in performing transportation in interstate and foreign commerce subject to Part II of the Act.

In a related application filed April 1, 1963, cited in footnote 1, ante, Braswell Freight sought authority under section 214 of the Act to issue its unsecured installment promissory note for the sum of $200,000 payable in five equal annual installments, the first installment being due and payable one year from date of consummation, and a like installment due and payable each year thereafter until the full amount, both principal and interest, has been paid, said note to bear interest at the rate of 4 percent per annum on

[2]By order of the Commission in No. MC-F-8655, dated May 5, 1964, merger of Braswell Freight Lines, Inc. into Braswell Motor Freight Lines, Inc. for ownership, management and operation, and acquisition of J. V. Braswell of control of the operating rights and property through the merger were approved and authorized. The transaction was consummated July 1, 1964, and by supplemental order, in the title proceeding, dated July 16, 1964, Braswell Motor Freight Lines, Inc. was substituted as vendee in lieu of Braswell Freight Lines, Inc., and as lessee of the properties of Warren G. Shayler, Deceased, Clarinda K. Shayler, Individually and as Executrix and sole devisee of said estate.

[3]The authority is sought under the provisions of section 5(2) of the Interstate Commerce Act, 49 U.S.C. 5(2).

the unpaid balance. Payment may be accelerated. At the hearing, Braswell Freight requested authority to (1) amend the section 5 application to show that payment for the Shayler Rights would be in cash, and (2) dismiss the section 214 application.

By another related application under section 210a (b), Braswell Freight sought authority to assume temporary control of the Shayler Rights at a total monthly rental of $250, pending final determination of the section 5 application. By order dated February 25, 1963, as extended July 17, 1963, temporary control was authorized and temporary control was commenced March 18, 1963.

Hearing on the applications was held in Oklahoma City, Okla., November 4 to 15, inclusive, 1963. The applications were opposed by 25 motor carriers[4], the Class I Rail Carriers in Western District, and both the Central Conference of Teamsters and Teamsters Local Union No. 710.

Briefs have been filed.

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[4]Be-Mac Transport Company, Inc., (Be-Mac); Campbell Sixty Six Express, Inc., (Campbell); Consolidated Forwarding Co., Inc., (Forwarding); Consolidated Freightways Corporation of Delaware (Freightways); Denver-Chicago Trucking Company, Inc. (Denver); East Texas Motor Freight Lines, Inc. (Texas); Fortier Transportation Company (Fortier); General Expressways, Inc. (General); Gillette Motor Transport, Inc. (Gillette); Illinois-California Express, Inc. (ICX); Interstate Motor Lines, Inc. (Interstate); Knox Motor Service, Inc. (Knox); Lee Way Motor Freight, Inc. (Lee Way); Missouri Consolidated Freightways (Missouri); Navajo Freight Lines, Inc. (Navajo); Pacific Intermountain Express Co. (PIE); Ringsby Truck Lines, Inc. (Ringsby); Roadway Express, Inc. (Roadway); Southwestern Transportation Company (Southwestern); Texas-Arizona Motor Freight, Inc. (Arizona); Transcon Lines, (Transcon); Viking Freight Company (Viking); Voss Truck Lines, Inc. (Voss); Watson-Wilson Transportation System, Inc. (Watson); Western Truck Lines, Ltd. (Western).

Preliminary Rulings

Objections were made at the hearing and renewed on brief to testimony[5] of the seller. Objection to statements 1(a) through (d) inclusive, was that the witness was not qualified to make the statements because she knew nothing about the actual conduct of the

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[5]1(a) "My husband conducted his trucking business under the above certificate and I was, in fact, a housewife." ***

(b) "My son, W. Thurman Shayler, was appointed Guardian and operated the business as such." ***

(c) "They [W. Thurman Shayler and a partner Mr. Barnett] conducted the operations until approximately 1956." ***

(d) "In all this time a stated monthly rental was paid from the operations to the Guardian who advanced funds to Mr. Shayler and myself for living." ***

2(a) "Business conditions for my son were bad and he became unable to make payments as required under the lease. In January of 1963 I became aware of the fact that the insurance covering the operations was being cancelled as of the 6th of February. My son advised me that he did not have the funds with which to keep insurance. He was, in fact, broke and unable to continue to operate the business." ***

(b) "My attorneys, Looney & Watts, advised me that the Estate cannot be closed and the certificate or title to certificate distributed to me at this time since some creditors of my son's in his operations of authorities have filed a suit against me over a debt. This is pending and I am told the laws of the State of Oklahoma will not permit the closing of an Estate for the distribution of the assets prior to the settling of all claims or litigation involving the Estate." ***

(c) "I will inherit certain small building and loan accounts. However, the inheritance taxes will exhaust this amount. Other than this I have no assets, and will be without funds excluding only the value of these motor carrier certificates. I ask that the Commission approve the sale as herein proposed since the authority not only represents my husband's life's work, but also represents the only asset capable of maintaining and keeping me during my remaining years. A denial would result in the authority being returned to me, and I would be absolutely unable to operate it. I would not have the funds to acquire the necessary equipment, and I would be unable to serve the public. It is my request that the *** Commission approve this proposed sale since it will provide a continuation of service for the public and will provide from the purchase price funds for me to live and not have to worry or go through the uncertainty which I have been placed in the past."

business. It is quite possibly true that she knew nothing of the conduct of the business of the Shayler Operation, but these statements had nothing to do with the conduct of the business. This information would come to her in the normal course of her relationship as wife of the original owner of the property, and as mother of the subsequent operator of the property. The witness was competent to testify, the testimony was material, relevant and competent. Its admission was proper.

Hearsay objection was made at the hearing and renewed on brief to statement 2(a). Information in the first, third and fourth sentences are admissable to show that the statements were made not to show their truth or falsity. *Michaud's Bus Line, Inc., Extention —Salem, Mass.*, 67 M.C.C. 711. The second sentence has nothing to do with the hearsay rule since she was testifying to a matter within her own personal knowledge. The ruling of the examiner was not improper.

Statement 2(b) was said to be hearsay, immaterial and irrelevant and the examiner should have granted protestants' motion to strike.

Objection to statement 2(c) was that it is immaterial, irrelevant and merely an attempt to invoke sympathy. Stripped of promotional coloring the seller is merely giving her reasons for disposing of the Shayler Rights. It is relevant, material and competent. Its admission was proper.

Objection was made at the hearing, and renewed on brief, to the operating ratio of Braswell Motor and all reference to that carrier in Exhibits H-12

through H-24, sponsored by V. E. Hensley, Comptroller for both Braswell Freight and Braswell Motor, because the latter (1) was not party to the proceeding, (2) no testimony was introduced that it was assuming or guaranteeing any of the obligations of Braswell Freight, (3) did not sign the contract of sale or the application, and (4) no minutes showing that it participated in the transaction. All of the capital stock of the applicant Braswell Freight is owned by Braswell Motor, which in turn is controlled by J. V. Braswell through ownership of its capital stock. Braswell Motor and J. V. Braswell jointly seek to control the Shayler Rights through the transaction under consideration. The sponsoring witness is comptroller for both the applicant and parent company. Exhibit A to the application calls for information, among others, respecting the person or persons controlling the transferee. This constitutes evidence under § 1.5(d) and § 1.19 of the General Rules of Practice before the Commission. Evidence on this matter is both relevant, material and competent. The ruling of the examiner was proper. Since the applicant has been merged into the parent company this matter is moot.

Protestants made a motion to strike the two sentences[6] recited below because V. E. Hensley, comptroller for both Braswell Freight and Braswell Motor,

[6]The management of Braswell Motor and Braswell Freight regard the operations as reflected in the financial data for the years 1958 through 1961 as being more representative of normal operations. The management of Braswell Freight and Braswell Motor feel that as soon as the labor difficulties and problems are solved, operations will return to normal and the tonnages, revenues and profits to be derived from operations will be at least the equivalent of that reflected in the financial data for the years 1958 through 1961.

was speaking for management and was not discussing anything in which he participated. This request was renewed on brief. In issue was the fact that Braswell Freight and the Shayler Operation had been losing money. The disputed testimony was an expression of management given by one of its top officers. Stating it in this manner saved repetition of this view by all the top officials from the President on down. However, the President of Braswell Freight did comment on this aspect in his prepared testimony. The witness was competent to testify on this matter and the testimony was germane to the issue. The ruling of the examiner was proper.

Objection to testimony[7] of protestant PIE was sustained and protestant requests reconsideration of the ruling. Interrogation of the witness by protestant's counsel disclosed that statement 1 came to the attention of the witness in the normal course of business from its Chicago office, which had obtained it from

[7] 1. Yes. We fear that some of the traffic will be diverted because of the payment by Braswell of a higher diversion to connecting lines, and the connecting line business is a very important business to our company where Braswell uses the Jeffries division sheet in the Chicago area where we conform to the transcontinental division sheets, as do our long-line competitors, as ICX, Denver-Chicago and those carriers, and also the payment of a higher local cartage to local cartage companies that perform pickup service at the various points within the Chicago Commercial Zone and short line points such as Elk Grove, Illinois and points in that area.

2. Speaking of rates, the fact that Braswell with the adoption of the Shayler tariffs, maintains lower rates into the Oklahoma area, the Southwest area formerly served by Shayler, has an influence on the transcontinental traffic due to the fact that the solicitors of Braswell, and rightly so, may approach a shipper on the basis that we're handling your freight at a lower rate into Oklahoma territory and therefore we want your transcontinental to make up the deficit, and I think that is definitely a probability in this proceeding.

Taylor Transfer, one of its Chicago connections. It is believed that it is offered to show that payment of higher divisions, and local cartage by Braswell may divert business from PIE. It is hearsay and its exclusion was proper.

Statement 2 is not proof of diversion of traffic by Braswell, but is fancied diversion, and its exclusion was also proper as opinion evidence.

Protestants request on brief, but they did not do so at the hearing, that the agreement in writing entered into between the seller and an unnamed individual, for the seller to pay this individual a finder's fee of about $12,000 for securing a purchaser for the Shayler Rights be made a part of this record. This information should have been submitted with the application. However, except for the name of the party,[8] the amount of the fee, and the fact that it was paid to an individual in Fort Worth who was not a member of the Braswell Freight was ascertained at the hearing. Its omission from the record is not fatal to the disposition of this proceeding and the request should be denied.

Background

The Shayler Rights emerged under the "Grandfather" provisions of the Motor Carrier Act of 1935. They were operated by the original owner until some time in 1946 when the original owner became ill and was adjudged incompetent. The son was appointed guardian of his father, the original owner, and the son operated the business as such. In 1948 the original

[8]It was probably a J. L. Hard who found the purchaser. Tr. 291-294.

owner was found to be competent, but the business continued under lease to the son, and a partner of the son, as a partnership. This lease was for a period of three years at a rental of $1,000 per month for the operating rights, plus regular unspecified payments on equipment. In 1949, the original owner was again ruled incompetent and the above partnership continued the lease through the son as guardian until 1958, when the partnership was dissolved due to ill health of the son's partner. The son thereafter conducted the business[9] as lessee from himself as guardian. The operating rights were again leased by the son from himself as guardian for an additional five years to begin January 8, 1962. The approval[10] of the Commission was dated December 6, 1961. The original owner died on December 15, 1961. On March 12, 1962, his wife Clarinda K. Shayler, who was named sole devisee and executrix under a will executed May 11, 1949, asked for letters testamentary and she was named executrix by the County Court of the County of Oklahoma, State of Oklahoma. The will was admitted to probate. The Shayler Rights which were leased to the son were the principal asset of the estate. The son continued to lease the Shayler Rights after the death of the original owner. Despite the efforts of the son to compete for traffic, and despite substantial financial assistance[11] from his mother Clarinda K. Shayler, the son's financial condition disintegrated to a point in 1962 where he was unable to pay the lease

[9]In No. MC-FC 35312 the operating rights were designated MC 116307.
[10]In No. MC-FC 35368 the operating rights were designated MC 116307.
[11]A loan of $22,000 evidence by a note, and the guarantee of an additional amount slightly in excess of $70,000.

rental on the operating rights and insurance. On January 4 and 7, 1963, the son was notified that his insurance would be cancelled effective February 6, 1963. Effort to obtain an extension of time for payment of insurance premiums was unavailing.

Because the lease rental was in arrears 13 months, because the lessee had extensive debt long past due which he was unable to pay, and because the value of the Shayler Rights was being placed in jeopardy, Clarinda K. Shayler on January 13, 1963, applied to the County Court of Oklahoma County for authority to cancel the lease of the Shayler Rights to her son the lessee, and sell the rights to Braswell Freight. The decree of the court issued the same day authorized cancellation of the lease, and authorized Clarinda K. Shayler, the seller, to do what was necessary to preserve the value of the certificate so as to preclude disruption of service, including the leasing of the Shayler Rights to another authorized operator. By letter dated February 4, 1963, Clarinda K. Shayler, the seller, notified her son that she was cancelling the lease effective February 6, 1963. Fifteen tractors and 33 trailers of the son, the lessee, were repossessed. Seven trailers leased by Clarinda K. Shayler, the seller, were returned to her.

The son, the lessee, notified the union by a letter dated February 5, 1963, of his inability to continue business and notified each employee individually of his condition. Operations over the Shayler Rights ceased as of the close of business on February 5, 1963. Some time in June, the son and former lessee of the Shayler

Rights filed a voluntary petition in bankruptcy, showing no assets, but listing among other claims, some $12,021.98 wages due employees, and $4,586 due the union health, welfare and pension fund. The son and former lessee of the Shayler Rights at the time of the hearing was managing a small restaurant in Oklahoma City. The son's conduct of the business under the Shayler Rights will hereinafter be referred to as the Shayler Operation.

Suggestions and inferences regarding claims against the seller, and the Shayler Operation have been made during the course of the hearing and in some instances on brief. These and other reasons form the basis for protestants' contention that the proposed sale of the Shayler Rights by the seller to Braswell Freight were not within the scope of section 5(2)(a) and would not be consistent with the public interest. Since the authority granted under section 5 is permissive only, any alleged claims against the properties involved must be settled between the parties, or by the courts. *Robert E. Sullivan—Purchase—Service Freight Line, Inc.*, 38 M.C.C. 621; *Wilson Storage & Transfer Co.—Purchase—Dakota Transportation, Inc.*, 36 M.C.C. 221 (223).

Vendee

Braswell Freight, a Delaware corporation, is a wholly owned subsidiary of Braswell Motor, which is in turn controlled through stock ownership of practically all of its outstanding capital stock, by J. V. Braswell. The latter as president, Hazel G. Braswell, and

H. J. Jones comprise the board of directors. Braswell Freight is authorized by certificate No. MC 1968[12] and certain subnumbered proceedings thereunder to operate as a common carrier by motor vehicle in interstate and foreign commerce of general commodities with exceptions, and certain specified commodities, over regular routes between Jackson, Miss., on the east and Dallas-Fort Worth, Tex., and Tulsa and Oklahoma City, Okla., on the west, and in addition its routes extend from New Orleans, La., on the south, through Jackson to Memphis, Tenn., on the north. It also holds some irregular route authority in and near Fort Worth. The parent company, Braswell Motor, by certificate No. MC 111383 subs 5, 6, 9 and 11 holds similar operating and commodity authority between Dallas-Fort Worth and Houston, Tex. and between those points and San Antonio, and El Paso, Tex., Phoenix, Ariz. and Los Angeles, Calif. In *Braswell Freight Lines, Inc., Extention-Atlanta*, 95 M.C.C. 457, decided July 1, 1964, Braswell Freight was authorized to operate as a common carrier by motor vehicle of general commodities, with exceptions, over a system of regular routes extending between Jackson, Miss. and Atlanta, Ga.

Some 25 terminals are operated. Their distribution by states is as follows: Arizona, two; California one; Louisiana six; Mississippi four; Oklahoma five; Ten-

[12]Braswell Freight is the successor to the operations formerly conducted by D. C. Hall Transport, Inc., acquisition of which was approved by the Commission on July 1, 1957, in No. MC-F 6154 and the related docket No. MC-F 6007. By order entered on the 24th day of April, 1959, the name of D. C. Hall Transport, Inc., was changed to Braswell Freight Lines, Inc.

nessee two; and Texas seven. A terminal is also maintained at Chicago, Ill. and St. Louis, Mo. through temporary control of the Shayler Operation. Commission agencies are maintained at Yuma, Ariz., Minden, La., Ardmore, Okla. and seven Texas locations.

Single leased wire teletype circuit connects all principal terminals of both companies and under temporary control has been extended to Chicago and St. Louis.

Some 650 pieces of equipment are used to conduct operations.

Braswell Freight and Braswell Motor have respectively 310 and 306 employees. Of these employees 75 and 73 respectively are line drivers.

A safety program is maintained under the direction of a full time safety engineer incorporating both inspection and promotion.

A full line of insurance is carried.

Braswell Freight conducts a regular route common carrier operation, providing pick up and delivery at its terminals, transporting both less-truckload (LTL) and truckload (TL). Braswell Motor and Braswell Freight combined hold out to perform (1) third morning delivery between Los Angeles, Calif., Phoenix, Tucson, and Yuma, Ariz., on the one hand, and on the other, Oklahoma City and Tulsa, also (2) first morning between Houston and Waco, Texas on the one hand, and, on the other, Oklahoma City and Tulsa. It has and does interlining with connecting carriers at Oklahoma City and Tulsa, including the Shayler

Operation. It also engages in trailer interchange with various connecting carriers, including the Shayler Operation. Soliciting of traffic is maintained and it has solicited traffic in conjunction with the Shayler Operation.

Braswell Freight and Braswell Motor participate in some 10 agency tariffs and each maintains an individual local tariff with reciprocal participation.

Vendor

The Shayler Rights sought to be transferred by the seller, Clarinda K. Shayler, are certificate No. MC 70380, and subs Nos. 1 and 2 thereunder. They authorize transportation as a common carrier by motor vehicle in interstate and foreign commerce of general commodities, with exceptions, over irregular routes (1) from Oklahoma City, Okla. and points and places within 125 miles of Oklahoma City, to points and places in the St. Louis, Mo.-East St. Louis, Ill. commercial zone, as defined in 1 M.C.C. 656 and 2 M.C.C. 285, and to points and places in the Chicago, Ill. commercial zone as defined in 1 M.C.C. 673; (2) from points and places in the part of Illinois on and east of a line beginning at Alton, Ill., and extending along U. S. Highway 67 to Virginia, Ill., thence along Illinois Highway 78 to Kewanee, Ill., thence along U. S. Highway 34 to Junction, Illinois Highway 88, thence along Illinois Highway 88 to Sterling, Ill., thence along Illinois Highway 2 to Dixon, Ill., and thence along Illinois Highway 26 to the Illinois-Wisconsin State line, and on north and west of a line beginning at the Illinois-Indiana State line and extending along

Illinois Highway 9 to Gibson City, Ill. thence along U. S. Highway 54 to Junction, Illinois Highway 48, thence along Illinois Highway 48 to Junction U. S. Highway 66, and thence along U. S. Highway 66 to the Mississippi River at a point north of East St. Louis, Ill., also from points and places in Indiana within the Chicago, Ill. commercial zone as defined in 1 M.C.C. 673 to points and places in Oklahoma; (3) from points and places in the St. Louis, Mo.-East St. Louis, Ill. commercial zone, as defined in 1 M.C.C. 656 and 2 M.C.C. 285, except points and places in Illinois in the aforesaid zone which are located on and north of U. S. Highway 66 to Oklahoma City, Okla. and points and places in Oklahoma within 125 miles of Oklahoma City. The transportation, over irregular routes, of carbide from Keokuk, Iowa, to points and places in Oklahoma, and the return of the empty containers is also authorized.

Agreement

By agreement dated January 28, 1963, the seller would sell to Braswell Freight the operating rights covered by certificate No. MC 70380, and subs 1 and 2 thereunder, for $250,000. Of the purchase price, $25,000 has been placed in escrow. If the transaction is approved by the Commission, the amount placed in escrow, plus the balance, would be paid in cash upon consummation. If the transaction is not approved, the money placed in escrow will be returned to Braswell Freight within 15 days from the date of the final order of the Commission disapproving the application. Approval of the transaction by the Commission, but

failure of consummation by Braswell Freight would result in the escrowed amount being forfeited to the seller Clarinda K. Shayler as liquidated damages. The latter warrants good title free of incumbrances. Both parties agree to cooperate in seeking approval of the transaction and incidental matters connected therewith. Consummation date is subject to agreement between the parties but in no event not later than 12 o'clock noon on the 15th day following the lapse of time for administrative appeal.

Clarinda K. Shayler discussed sale of the business with her husband prior to his death. Efforts were made to sell the property to others but were unsuccessful. Braswell Freight was located as a prospective purchaser by a third party[18] at Fort Worth to whom she is obligated to pay about $12,000 finder's fee which does not appear unreasonable in view of the purchase price and since there was no evidence that the third party was trafficking in operating rights. *Lease Plan Int'l Corporation*, 93 M.C.C. 203. Clarinda K. Shayler, the seller, gave her attorney and W. Thurman Shayler authority to negotiate the sale of the operating rights. Representatives of Braswell Freight contacted agents of the seller about June or July 1962. Since it was the desire to sell both the automotive equipment and operating rights the original asking price was $350,000. After some six months of negotiations a price of $250,000 was agreed upon for the operating rights only. Seller has consented to payment in cash.

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[18]See footnote 8 ante.

Financial Data

Financial Statement—A balance sheet as of September 30, 1963, of Braswell Freight shows assets aggregating $2,230,466, including current assets of $1,314,642, of which $790,076 is cash; tangible property, less reserve for depreciation, $647,408; intangible property less reserve for amortization $104,231; investment securities and advances $5,171; and miscellaneous $159,014. Its liabilities, including current liabilities $449,317. The capital stock account includes $1,850,000 capital stock and ($68,851) earned surplus. Its revenues for 1961, 1962, and 1963 (first nine months) were $3,345,837; $3,091,401, and $2,356,490. Deficits for those periods were ($1,796); ($318,174); and net income $57,313 after provision for income taxes. The latter figure was adjusted to reflect an income tax refund, and in a prior year depreciation adjustment totalling $221,203 shows net income of $57,313 rather than a deficit of $163,890 had the tax adjustment not occurred.

A balance sheet as of September 30, 1963 of Braswell Motor shows assets aggregating $5,972,196, including current assets of $2,263,115, of which $1,621,750 is cash; tangible assets, less reserve for depreciation $1,945,898; intangible property less reserve for amortization $243; investment, securities and advance $1,755,396; other deferred debits $7,544. Its liabilities, including current liabilities, were $325,278; long term debt due within one year $88,921, after one year $266,763. Capital stock $3,500,000, and earned surplus $1,791,234. Its revenues for 1961, 1962 and 1963

(first nine months) were $4,323,022; $3,283,968 and $2,370,601. Net operating revenue and operating losses for those periods were $429,272, ($49,785) and ($46,485). Deficits after provision for income taxes for 1961 and 1962 were respectively ($135,895) and ($150,952). Net income after provision for income taxes for the first nine months of 1963 was $33,363.

A balance sheet as of September 30, 1963 reconstructed to give effect to the merger of Braswell Freight in Braswell Motor show total assets aggregating $6,440,327 including current assets of $8,561,794, of which $2,411,826 is cash; tangible property less reserve for depreciation $2,593,306; in tangible property, less reserve for amortization $104,474; investment, securities and advances $17,191; and other deferred debits $163,562. Its liabilities, including current liabilities $758,632; long term debt due within one year $88,921, and after one year $266,763. Capital stock $3,500,000 and total surplus $1,826,011.

An adjusted balance sheet as of December 31, 1962, for the Shayler Operation shows assets aggregating $433,707, including current assets $131,805, of which $9,293 was cash. Tangible property, less reserve for depreciation $301,902. Its liabilities were $537,947, comprising current liabilities of $297,909, and long term debt of $240,038. Net worth is ($104,240). Its revenues for 1960, 1961, and 1962 were $1,059,546, $1,007,367, and $829,344, respectively. For the same years it experienced deficits of ($11,022), ($12,374) and ($148,465).

A balance sheet giving effect to the purchase of

the Shayler Rights from the seller Clarinda K. Shayler by Braswell Freight as of September 30, 1963, shows the purchase price of $250,000 plus expenses accrued in connection with the transaction ($5,782) will be charged to intangible property, with offsetting credits to cash of $225,000 and to other deferred debits of $30,782 ($25,000 escrow and $5,782 expenses).

A giving effect income statement for the Braswell Freight and Shayler Operation, as of December 31, 1961, shows consolidated revenue of $4,353,204, net operating revenue of $179,250, and net income before provision for income taxes of $227,584 after adjustment for anticipated savings of $241,754. A similar statement for 1962 reflecting strike conditions since April 23, 1962, shows a deficit of ($233,060), after adjustments for anticipated saving of $233,579.

Contentions of Parties—Although no standards of comparison are shown protestants' on brief contend that the purchase price of $250,000 for the Shayler Rights is excessive and particularly in view of losses over recent years of Braswell Freight, Braswell Motor and the Shayler Operation. They urge that the transaction should not be approved in view of those losses which stem in part, at least in the view of some protestants to the maintenance of local rates lower than conference rates and to a labor dispute. Braswell Freight disputes the arguments both at the hearing and on brief. It is claimed that based on the gross revenue of the Shayler Operation, the traffic interchanged between Braswell Freight and Shayler, the benefits to Braswell Freight and Braswell Motor of

the traffic centers of Chicago and St. Louis, the purchase price, based on arms length bargaining, is the market value, is worth the amount to be paid for it and is just and reasonable. On brief, attention is directed to the financial condition of both the applicant and the parent company as shown by their individual and consolidated balance sheets as of September 30, 1963—no equipment obligations—the only long term debt is the obligations outstanding on the purchase of Braswell Freight—combined indebtedness of the companies $1,130,000 vs combined assets of $8,200,000. Settlement of the labor problems and coupling the revenues experienced under the Shayler Operation with economies of upwards of $200,000 annually will return the Braswell Freight and Braswell Motor to the profit column. Applicant on brief discount the effect of the lower rates on its revenue since it affects less than 5 percent of its traffic, and that it reduced the revenue on such traffic by less than 2 percent of the revenue that would have been received by application of conference rates. Moreover, they conclude that since these lower rates were established to meet competition, they would not affect earnings because they increased earnings by gaining or regaining traffic that would not otherwise have moved over Braswell lines.

Purchase Price—Braswell Freight would pay $250,000 for the Shayler Rights. These rights would complement those of Braswell Freight and Braswell Motor by opening up for the first time on a single line basis the large industrial cities of St. Louis and Chicago and their environs. Tapping outlying industrial centers in Illinois and Oklahoma should enhance revenues.

It should improve service by reducing handling of traffic and delays at Oklahoma City and Tulsa, all of which would buttress the transportation posture of Braswell Freight and Braswell Motor. Had the Shayler Rights been operated by Braswell Freight in 1961 and 1962 it is estimated that some quarter of a million-dollars in savings could have been effected. Revenues from the Shayler Operation for each of the years 1960, 1961 and 1962 approximated one million dollars annually. As noted above Braswell Freight expresses the opinion that the purchase price is worth the amount to be paid for it, that it is the market value and that it is just and reasonable. Negotiations were conducted by arms length bargaining over a six months period. The purchase price, in the considered opinion of the examiner is not found to be inconsistent with the public interest. *Southeastern Greyhound Lines—Purchase (Portion)—J. B. LeVan and Florence LeVan*, 55 M.C.C. 543.

The balance sheet of Braswell Freight as of September 30, 1963 shows cash on hand of around $800,000. A favorable working capital exists. There is no long term debt. Although over capitalized it is an equity type and, even so, is not large. The reconstructed balance sheet giving effect to the merger of Braswell Freight into Braswell Motor shows capitalizable assets are $5,106,344 comprised of working capital of $2,601,096 composed cash $2,411,826, prepayments $117,082 and material and supplies $72,188 and operating equipment less depreciation $2,505,248. Capitalization is $3,855,684, comprised of long term debt $355,684, and capital stock $3,500,000. The excess of

capitalizable assets over capitalization is $1,250,660. Ratio of long term debt $355,684 to total long term debt and stockholders equity $5,681,695 would be 6.3 percent.

According to Braswell Freight economies will flow from the acquisition in saving interest payments, elimination of terminals at Oklahoma City and Tulsa of the former Shayler Operation, savings on insurance, fuel and tires. No new equipment is being acquired since Braswell has sufficient equipment to operate the rights sought.

Braswell Freight is of the opinion that considerable profit can be obtained without any increase in volume of traffic, and an analysis of the rights sought indicate earnings of upwards from $150,000 a year before provision for income taxes.

With its labor trouble resolved Braswell Freight should experience no difficulty in approaching its estimate of net income of $227,584 before provision for income taxes from the combined properties as shown in its giving effect income statement for the year ended December 31, 1961. On this basis it could recover the purchase price in not more than two and one-half years. No fixed charges are being incurred. Braswell should be able to meet the purchase price without undue difficulty, and its ability to serve the public would not be impaired. The examiner concludes that applicant is financially able to consummate the proposed transaction. Under the circumstances, the examiner recommends that Braswell's motion (1) to amend the section 5 application to show that payment for the

operating rights would be in cash, and (2) to dismiss the section 214 application, be granted.

Shayler Operation

The Shayler Operation was operated under either guardianship or lease from the time the original owner was adjudged incompetent in 1946 until it ceased operation on February 6, 1963. The operation was "an irregular route, on-call service with no fixed schedules or routes." Highway selection followed no particular pattern and was dictated by the safest, fastest, and most economical route between the particular points involved. Leased terminal facilities were maintained only in Chicago, St. Louis, Tulsa and Oklahoma City. The general office was at the last point. Some 36 pieces of equipment were operated. Cartage was primarily used at the terminals but pick up and delivery equipment was also operated in St. Louis and Chicago. It employed some 44 persons. Interchange in 1962 was conducted only at Chicago, St. Louis, Tulsa and Oklahoma City. And, there may have been some interchange at Waurika. Interchange at Tulsa and Oklahoma City was with 23 carriers including Braswell Freight. Rates of the Shayler Operation were maintained (up until Braswell Freight assumed temporary operation) in some six conference tariffs including the Rocky Mountain Motor Tariff Bureau. It also maintained an individual local tariff.

The demise of the Shayler Operation was however, attributed to several factors: (1) mergers of carriers with which it interchanged traffic; (2) inauguration of piggy back operations since the Shayler Operation

was predominantly TL, (3) inability to settle claims and interline accounts promptly, lost traffic, and (4) the purchase of new equipment in 1961 to attract more LTL traffic.

Seller

Clarinda K. Shayler, the seller, was the wife of the original owner and mother of the one that conducted the Shayler Operation under lease from some time in 1946 up through the death of his father until the lease operation ceased in February of 1963. The seller came into possession of the Shayler Rights by virtue of a will. Lease of the Shayler Rights to her son, the Shayler Operator, continued until he became in arrears in the lease rental for 13 months, and the seller had exhausted her ability to aid him financially. Since she cannot operate the Shayler Rights, Mrs. Shayler is selling them because she is (1) essentially a housewife without business experience, (2) 66 years of age, and (3) without financial resources to operate the Shayler Rights even if she could.

Braswell Freight

Since it has maintained interchange with the Shayler Operation as one of its principal connections, Braswell Freight is seeking to purchase the Shayler Rights to insure present traffic patterns of Braswell Freight and Braswell Motor on traffic moving to and from points on the Shayler Rights, and to maintain or preserve as well as restore Braswell Freight and Braswell Motor, and (2) Braswell Freights need for a heavy volume of interchange traffic at Oklahoma City

and Tulsa to bolster its lack of substantial traffic moving to and from those Oklahoma junctions.

Braswell Freight points out that; the combined operation will give single line service all weather route between Chicago and St. Louis on the one hand, and, on the other, the South Pacific coast and will reduce handling of freight in interchange, reduce loss and damage claims, improve tracing service, expedite the movement of freight, and assure the public of greater and better facility and ease for the movement of shipments.

No additional equipment is being obtained to conduct the operation.

Service is to be maintained on irregular route basis. The operation will be on a call and demand basis and will comply with standards laid down in *Transportation Activities of Brady Transfer & Storage Co.*, 47 M.C.C. 23. Over the road vehicles may not move out every day but pick up will go on five days a week. Northbound traffic originating on Braswell will be dispatched promptly on arrival at the Oklahoma junctions. Through trailer service will be operated.

Choice of the highway will be left to the driver—not sure but probably most of the drivers will use U. S. Highway 66 which is the short route.

Braswell Freight hopes to increase its tonnage and revenue. It is said that every pound of freight that can be carried will be carried.

On brief applicant asserts that approval of the transaction will not (1) result in conversion of the

Shayler Rights from irregular to regular, (2) institute a new service, (3) result in unfair competitive practices, and (4) adversely affect competing carriers. Braswell Freight according to applicant is financially able to consummate the transaction without impairing its ability to serve the public, and that approval of the transaction will enhance adequate transportation to the public.

Supporting Carrier

H. A. Day d/b/a Day Truck Line is authorized, among others, by certificate No. MC 97461, to transport property between Oklahoma City and McAlester, Okla., over U. S. Highway 270. Operations have been conducted for 15 years. Traffic is interchanged with all carriers, including the Shayler Operation and the applicant. Traffic preponderates southbound. Day has found Braswell Freight dependable and reliable and urges approval of the application.

Supporting Shippers

Seventy shippers from Chicago, Ill., St. Louis, Mo., Oklahoma City, Sapulpa and Tulsa, Okla., Phoenix and Tucson, Ariz., Commerce, Compton, El Hambra, Inglewood and Lawndale, Calif., Arlington, Dallas, El Paso, Ft. Worth, Houston, Midland, Odessa and Waco, Tex., either by direct testimony or stipulation had found the service of Braswell Freight in its conduct of the Shayler Operation under temporary control satisfactory and urged that the transaction be approved. Testimony of 38 of these witnesses was stipulated since it would have been cumulative in nature.

These shippers in general received and shipped a wide variety of commodities[14] to and from points and beyond points, on the Shayler Operation, Braswell Freight and Braswell Motor. Shipments are both LTL and TL with the former predominating. Weight of the LTL shipments range from 27 to 10,000 pounds per shipment. Frequency of shipments range from daily which preponderates to one every six months.

Some of the shippers had used the services of the Shayler Operation prior to the cessation of that carrier. Other had used the services of both Braswell Motors and Braswell Freight. Still some had used the joint service of the Shayler Operation and Braswell

[14]Shower doors; medicine cabinets; range hoods; intercoms; tools and equipment; grocery and marketing and equipment; automotive plastic products; ceramics; books and periodicals; castings; heavy trailer axles, foundry supplies, bearings; brake drums; air brake parts; signs and parts; confections and candy; chewing gum; pickles, preserves and jelly; artificial flowers; containers, glass, metal and plastic; valves, iron and brass; electrical testing equipment; metal lithograph prints; alumninum window sash; kitchen utensils; electrical transformers; precision tools; ventilating components; air filter elements; pumps; motors; pipe fittings; electrical accessories; oil field chemicals and equipment; supplies for power transmission systems; plumbing, heating and air conditioning components; motion picture films; glassware; hotel, restaurant equipment and supplies, truck equipment and parts; electrical trade supplies; styrofoam products and presses; fiberglass parts and signs; plastic houseware articles; lubricating oils and greases; asphalt roofing products; cleaning products; household goods; department store goods and sundries; carpet; drugstore goods and sundries; ornamental iron components; foods; trailer parts; janitor supplies and equipment; automobile clutch parts; brake lining; diesel engine supplies and parts; electronic equipment; industrial valves and assorted parts; mechanical and electrical machined products and components; abrasive and diamond blades; core drills; masonry and concrete saws; joint seamers and sealing grinders; chemicals and detergents; seat covers; protector mats; automobile accessories; wire display racks, lamp shades and wire parts; oil covers for automotive vehicles; lighting fixtures; plastic articles; brakes, new and reconditioned; vacuum tires; hardware and automotive supplies and parts; and hotel and restaurant supplies.

Freight prior to the stoppage of the former. While all of the shippers were using the service now under temporary control of Braswell Freight four of the five California shippers are using Braswell Motors and Braswell Freight because the former will cross picket lines which surround their plants to pick up and deliver their traffic. These four shippers have been operating their business under strike conditions under varying dates since June 1962. Two, however, used Braswell Motor prior to the strike condition. Irrespective of this factor they have found Braswell Motor's service excellant and they intend to continue to use it. Some of the shippers felt that it was good to have competition in the carrier industry the same as other industry.

These shippers had found the service of Braswell Freight and Braswell Motor dependable and reliable and tailored to their respective needs, and they urged a continuation of the service.

All of the shippers were desirous of expeditious transportation of their shipments. They were aware generally that the Shayler Operation was irregular route in character. By and large they believed their needs could be accommodated to such service if reasonable transit time were observed.

Although some of the shippers freely admitted they were taking traffic from other carriers, they were equally free to admit that they had not ceased to use other carriers many of which are protestants here. While complaints against other carriers service were few and restrained, there is no doubt that dissatisfac-

tion with other service influenced diversion of some traffic.

Approximately only nine of those testifying evinced any real interest in the lower rates of the Shayler Operation and Braswell Freight. Most of these, if not all, claimed it was only one factor in attracting them to Braswell Freight. One shipper stated categorically that the use of Braswell was not based on the rate. They did observe that the price is always a matter of consideration.

Whatever motivated these shippers to support the continuation of service now being conducted by Braswell Freight under temporary authority, it is difficult to believe that these witnesses, many of whom represented substantial companies, traveled to Oklahoma City for distances up to about 1,400 miles, did not have a sincere belief that both Braswell Freight and Braswell Motor gave good service, that the service was the kind that they needed to support their business, and that it should be continued.

Protestants

The Atchison, Topeka, and Santa Fe Railway Company introduced the only testimony on behalf of Class I Rail Carriers in the Western District. Its rail network parallels the routes of the Shayler Operation-Braswell Freight and Braswell Motor from Chicago on the east to Los Angeles on the west coast. Its primary interest is that it will afford an aggressive carrier single line service from Los Angeles, Phoenix, El Paso, Houston, Fort Worth and Dallas to Chicago in

direct competition with Santa Fe.

Be-Mac is authorized by certificate No. MC 10872,[15] to transport between points in Oklahoma on the one hand, and, on the other, St. Louis and Illinois points. It interchanges traffic to and from the west coast at Oklahoma City. Among others, terminals are maintained at Chicago, Rockford and Springfield, Ill., Tulsa and Oklahoma City. It employs over 300 persons and operates over 496 pieces of equipment. Its operating revenue (ratio) for 1962 was 91.5 and for the first second and third quarters of 1963 they were respectively 95.2, 91.7, and 90.5.

Campbell is authorized by certificate No. MC 75320 to transport between Tulsa on the south and Chicago and St. Louis on the north. Its operating ratio for 1962, and the first three quarters of 1963 were respectively 92.3; 97.3; 89.5 and 92.4.

Forwarding is authorized by certificate No. MC 906 to transport between Dallas and Fort Worth on the south, and St. Louis and Chicago on the north, including Tulsa and Oklahoma City, and numerous other points in Oklahoma. Terminals are located among others, at Chicago, St. Louis, Muskogee, Oklahoma City and Tulsa, also Dallas. Approximately 600 people are employed and 651 pieces of equipment are operated. Operating ratios for 1962 and the first three

[15]Hereinafter, it will be understood that the carrier is authorized to operate as a common carrier by motor vehicle of general commodities, with exceptions, and in some instances carriers of certain specified commodities, over regular routes, and in some instances over irregular routes. Only the authority pertinent here is recited.

quarters of 1963 were respectively 94.8; 94.8; 92.7 and 92.9.

Freightways is authorized by its certificate No. MC 42487 to transport between Chicago and St. Louis on the east, and on the west Phoenix and Tucson, Arizona and Los Angeles. Its affiliate Missouri is also appropriately authorized to operate between Denver, Colo., and Liberal, Kans. on the west and on the east Chicago and Indianapolis, Ind. Among terminals maintained are Chicago, St. Louis, Tucson, Phoenix and Los Angeles. Systemwide some 8000 pieces of equipment are operated. Operating ratios for 1962, and the first three quarters of 1963 are respectively 98.9; 103.3; 98.8, and 95.0. The operating ratio for the affiliate was below 91.1 for the four periods.

Denver is authorized by certificate No. MC 29988 to transport between Chicago and St. Louis on the east and Phoenix, Tucson and Los Angeles on the west. Terminals, among others are maintained at these points. Exhibits sponsored show investment in plant and equipment, personnel complement, and payroll at those points. Systemwide some 2200 persons are employed and 2,162 pieces of equipment are operated. It says it continues to get traffic from St. Louis from the Herman Oak Leather Company but it has lost the traffic from this company out of Chicago. Operating ratios for 1962 and the first three quarters of 1963, were respectively 91.1; 93.6; 90.1; and 86.6.

Texas is authorized by certificate No. MC 41432 to transport between Chicago and St. Louis on the north, and on the south Dallas, Fort Worth, Houston and San

Antonio. Terminals are maintained at these points. Employment and equipment located at these points are respectively 787 and 739. Systemwide it employs 2000 persons and operates 1352 pieces of equipment. Operating ratios for 1962 and the first three quarters of 1963, were respectively 91.3; 94.0; 90.7; and 91.3.

ICX is authorized by certificate No. MC 48958 to transport between Chicago on the east and Los Angeles on the west through Cheyenne, Wyo., and Denver, Colo., serving, among others, Amarillo, Dallas, Fort Worth, and El Paso. Except for Cheyenne terminals are located at all those points. It employs some 2000 persons and operates 1638 pieces of equipment. Operating ratios for 1962 and the first three quarters of 1963 were respectively 92.6; 97.7; 94.2; and 93.4.

Knox is authorized by certificate No. MC 19553, to transport between various points and places in Northern Illinois. Except for Moline and Rock Island all of the points of service at which terminals are maintained are in the defined area in Illinois from which traffic is authorized under the Shayler Rights for southbound service. It operates some 250 pieces of equipment.

Lee Way is authorized by certificate No. MC 61440 to transport between Chicago and St. Louis on the north, and on the south, numerous points in Oklahoma, including Tulsa and Oklahoma City, Amarillo, Dallas, Fort Worth, San Antonio, and Houston. Terminals are maintained at these points as well as at numerous points in Oklahoma. It operates 1664 pieces of equipment. Its operating ratio for 1962, and the first three

quarters of 1963, are respectively, 95.8; 98.5; 94.9; and 98.1.

Navajo is authorized by certificate No. MC 76032 to transport between the Los Angeles, Phoenix, El Paso, Amarillo, and Odessa, Tex., gateways on the one hand, and, on the other Chicago and St. Louis. General which is managed by Navajo is also a protestant here. Terminals maintained at these points have a book value of over $2 million. The two companies employ some 2500 persons. Navajo as of July 1, 1963 operated some 2200 pieces of equipment. It was stipulated that the testimony of Navajo would be the same as that of Arizona, Freightway, Denver, and Ringsby. Operating ratios of this protestant for 1962 and the first three quarters of 1963, were respectively 97.2; 98.9; 96.2; and 94.3.

PIE is authorized by certificate No. MC 730 to transport between Chicago and St. Louis on the east and the Pacific Coast serving the territory on the south to Flagstaff, Ariz. Among others it has terminals at Chicago, St. Louis and Los Angeles. The original cost of the buildings at those points approximates $3 million. It operates about 4000 pieces of equipment. Operating ratios for 1962, and the first three quarters of 1963, are respectively 94.0; 97.2; 93.6; and 93.4.

Ringsby is authorized by certificate No. MC 52709 to transport between Chicago and St. Louis on the east, and Pacific Coast points on the west. Fortier, a wholly owned subsidiary, and a protestant here is authorized by its certificate No. MC 108398 to transport general commodities with exceptions, over irregu-

lar routes between a defined area in California. Ringsby maintains terminals at Chicago, St. Louis and Los Angeles. Investment in plant and equipment at those terminals aggregates $13 million. Some 328 persons are employed at those points. Its September payroll was approximately a quarter of a million dollars. Its operating ratios for 1962, and the first three quarters of 1963, were respectively 95.3; 95.9; 95.2; and 95.8.

Roadway is authorized by certificate No. MC 2202 to transport between the Illinois points, including Chicago, also St. Louis on the one hand, and, on the other, Oklahoma points, Dallas, Fort Worth, Houston and Waco, Texas. Terminals are located at Chicago and St. Louis, Afton, Oklahoma City, and Tulsa, Okla., Dallas, Fort Worth, Houston, San Antonio and Waco, Texas. Some 4800 pieces of equipment are operated. Although not identified it says it lost traffic to the Shayler Operation because of the latter's lower rates. Its operating ratios for 1962 and three quarters in 1963 were respectively 90.6; 93.8; 89.3; and 89.3.

Southwestern is authorized by certificate No. MC 59488 to transport between St. Louis on the one hand, and, on the other, Shreveport, La., Dallas, Fort Worth, and Waco, Texas. It employs 760 persons and operates 786 pieces of equipment. Operating ratios for 1962 and the first three quarters of 1963 were respectively 98.9; 99.5; 94.8; and 96.6.

Arizona is authorized by certificate No. MC 59894 to transport between St. Louis on the one hand, and, on the other Los Angeles and intermediate points such as Dallas, El Paso, Phoenix and Tucson. Terminals

among others, are maintained at St. Louis and Los Angeles. It employs some 455 persons and operates about 470 pieces of equipment. Annual payroll is $3½ million. Operating ratios for 1962, and for the first three periods in 1963, were respectively 95.5; 94.5; 94.8; and 95.2.

Transcon is authorized by certificate No. MC 110325 to transport between Chicago and St. Louis on the one hand, and, on the other Oklahoma and Texas points also west coast points. Terminals, among others are maintained at Chicago, Dallas, Houston, Los Angeles, Oklahoma City, Phoenix, St. Louis, Tulsa and Tucson. It employs 1700 persons and operates about 1200 pieces of equipment. Operating ratios for 1962 and the first three quarters of 1963 were respectively 87.1; 88.8; 85.6 and 84.3.

Watson is authorized by certificate No. MC 70451, to transport between Chicago and St. Louis on the one hand, and on the other, Los Angeles. It maintains terminals at 44 points including those named. Its capital investment in plant and equipment is substantial, as is its pay roll. System employment is 2100 persons. Some 2700 pieces of equipment are operated. Operating ratios for 1962 and the first three quarters of 1963 were respectively 103.5; 105.6; 99.8; and 96.1.

Viking is authorized by certificate No. MC 35484 to transport between St. Louis and Chicago (including the southbound origin area in Illinois) on the one hand, and, on the other Oklahoma points, also Dallas and Fort Worth. Normally it is an LTL carrier. Terminals are maintained at the critical points. Employ-

ment is approximately 1400 persons. It operates 1462 pieces of equipment. Operating ratios for 1962, and for the first three quarters of 1963, are respectively 96.6; 99.8; 93.5; and 93.6.

Western-Gillette-Voss, are authorized by their respective certificates Nos. MC 8948, 2309 and 1422, to operate between Chicago and St. Louis on the east, and on the southwest and west, Tulsa, Oklahoma City, Dallas, Fort Worth, Houston, El Paso, Tucson, Phoenix and Los Angeles. Among others, terminals are maintained at the named points. Some 1577 pieces of equipment are operated systemwide. Approval of the transaction would establish a system parallel to protestants. Operating ratios for 1962 and the first three quarters of 1963 were respectively, for Western 99.3; 91.9; 96.1, and 97.3, for Gillette 94.3; 89.5; 94.2; and 94.5, for Voss 95.5; 111.8; 100.1 and 86.7.

Motor carrier protestants introduced in evidence traffic studies designed to show the percentage of tonnage and revenue affected by the transaction, to the protestant's total tonnage and revenue, and to demonstrate any imbalance in traffic which could worsen if diversion were effected.

At the hearing and on brief these motor carrier protestants assert that (1) the Shayler Rights had little or no competitive influence, (2) the Shayler Rights are dormant except between Chicago, St. Louis, Tulsa and Oklahoma City, and no need has been shown for their activation, (3) it will create a new service for which no public need has been shown, (4) conversion of the Shayler Rights from irregular to regular char-

acter cannot be avoided if the transaction is approved, (5) the only business attracted to the operation would be based solely on lower rates, and not on service, such rates being the basis for Braswell's financial trouble if it actually has such, (6) traffic will be diverted, (7) there is an abundance of service in the affected area and there is no need for additional service, (8) the employees will be adversely affected, (9) the purchase price is excessive, and (10) it will adversely affect existing transportation conditions and is contrary to the public interest.

Utilization of Shayler Rights

Some of the protestants contend that various portions of the Shayler Rights are dormant, both as to territory, commodities and shippers served, and that no need has been shown to reactivate those inactive parcels.

Numerous traffic exhibits have been introduced in evidence to support approval of the application. An exhibit attached to the application lists some 6,120 LTL and TL shipments transported by the Shayler Operation for the six months' period of July through December 1962. It shows all the shipments for July and December, and shipments for the first, second, third, and fourth weeks respectively for the months of August, September, October and November.

Of some 2752 shipments originating at, or transported through Chicago; 1725 originated in the Chicago commercial zone, *supra;* 221 had their source in an area in Illinois outside of the zone, bounded by

Duquoin on the south, De Kalb on the north, Robinson on the east, and Rock Island on the west. This area is considerably more extensive than the wedge shaped origin[16] territory authorized in the Shayler Rights. Principal origin points of service, except for Alton and East Alton, are located in the counties in the vicinity of the Chicago commercial zone, *supra*. Some 806 shipments for southwestern destinations were received in interchange at Chicago. Oklahoma City, Tulsa, outlying Oklahoma points were terminals respectively for 1,007; 507 and 429 of these shipments. Some 809 shipments for destination beyond Oklahoma were interlined with connecting carriers at either of the two Oklahoma junctions.

Of the 1988 shipments originating at, or moving through St. Louis; 258 originated in the St. Louis commercial zone, *supra;* 151 also originated in the outlying area of Illinois described heretofore, and 1579 shipments moved south through St. Louis. Oklahoma City, Tulsa, and outlying Oklahoma points terminated respectively 636; 336 and 660 shipments. The Oklahoma junctions were interline points for 356 shipments destined beyond.

The 372 shipments originating outside of the Chicago commercial zone, *supra*, came from 42 Illinois points. Thirty six of the points are in the wedge shaped origin territory in Illinois authorized as points of service under the Shayler Rights. Included in these

[16]The vertex centered about the St. Louis area, the breadth of its base, which included Chicago and its commercial zone, extended from a point on the Illinois-Wisconsin State line just north of Freeport, Ill., to a point on the Illinois-Indiana State line just east of Paxton, Ill.

shipments are: One truckload of 20,000 pounds or over from Alton; three less-truckloads and four truckloads of 20,000 pounds or more from Chicago Heights; four truckloads of 20,000 pounds or more from East Alton; one less-truckload from Highland Park; two less-truckloads and one truckload of $20,000 pounds or more from Joliet; one less-truckload from Northfield; one truckload of 20,000 pounds or more from Rock Falls; and eight less-truckload and two truckloads of 20,000 pounds or more from Sycamore. Included in approximate 125 terminated in Illinois were: One less-truckload to Alton; one less-truckload to Aurora; one truckload of 20,000 pounds or more to Chicago Heights; one truckload of 20,000 pounds or more to Peoria; five truckloads of 20,000 pounds or more to Plainfield, and one truckload of 20,000 pounds or more to Park Forest.

Of 1041 shipments originating at, or interlined through Oklahoma City; 699 were from that city and 222 were from other Oklahoma points. Some 120 northbound shipments were interlined at Oklahoma City. Chicago, St. Louis, outlying Illinois points were destinations respectively for 293; 88, and 81 shipments. Interlined at either Chicago or St. Louis were 579 shipments destined beyond Illinois.

Tulsa was origin or interline point for 339 shipments. Of this total 186 were from Tulsa, and 73 from other Oklahoma points. Eighty northbound shipments were interlined at Tulsa. Chicago, St. Louis and outlying Illinois points were destinations respectively for 36; 87 and 54 shipments. Interlined through Chicago

or St. Louis for destination beyond Illinois were 162 shipments.

Excluding Oklahoma City and Tulsa some 1089 shipments are shown as originating or terminating at outlying Oklahoma points. Included in the above were: Miami, Ottawa County, nine shipments terminated—one a truckload of 20,000 pounds or over; Pryor, Mayes County, 13 shipments terminated—one weighing 6600 pounds; Muskogee, Muskogee County, 59 shipments terminated—one weighing 5285 pounds, and four truckloads, each weighing 20,000 pounds or over; Krebs, Pittsburg County, two shipments terminated—one weighing 5440; Hugo, Choctow County: terminated seven shipments—originated 31 shipments, one weighing 5215 pounds, and one truckload weighing 20,000 pounds or more; Bartlesville, Washington County: terminated 33 shipments, one weighing 5186 pounds — originated 18 shipments; Sand Springs, Tulsa County: terminated eight shipments—originated 18 shipments, five weighing from 10,000 to 20,000 pounds each, and 13 truckloads each weighing 20,000 pounds or over; Sapulpa, Creek County: terminated nine shipments one weighing 5205 pounds—originated 37 shipments, 27 weighing less than 5,000 pounds each, two weighing from 5,000 to 10,000 pounds each, five weighing from 10,000 to 20,000 pounds each, and three weighing each 20,000 pounds or over; Okmulgee, Okmulgee County: terminated 21 shipments—originated seven shipments, one weighing less than 5,000 pounds, six weighing each, 20,000 pounds or over; Henryette, Okmulgee County: terminated four shipments, one a truckload weighing

20,000 pounds or more—originated 47 shipments, one weighing less than 5,000 pounds, two weighing from 5,000 to 10,000 pounds each, three weighing from 10,000 to 20,000 pounds each, and 41 weighing each, 20,000 pounds or more; Ponca City, Kay County, 35 shipments terminated, two weighing respectively 6321 and 6901; Stillwater, Payne County, 19 shipments terminated, one weighing 5687 pounds; Shawnee, Pottawatomia County: terminated 35 shipments—originated two shipments, one weighing less than 5,000 pounds, and one weighing 20,000 pounds or over; McLoud, Pottawatomia County, one shipment weighing 5056 pounds terminated; Ada, Pontotoc County: terminated 25 shipments—originated 15 shipments, one weighing less than 5,000 pounds, and 14 weighing each, 20,000 pounds or more; Lindsay, Garvin County: terminated, four shipments—originated nine weighing each 20,000 pounds or more; Wynnewood, Garvin County, three shipments terminated, two weighing less than 5,000 pounds each, and one weighing 20,000 pounds or more; Ardmore, Carter County, 17 shipments terminated, 16 weighing less than 5,000 pounds each, and one weighing 20,000 pounds or over; Enid, Garfield County, 63 shipments terminated, 59 weighing less than 5,000 pounds each, two weighing from 5,000 to 10,000 pounds each, and two weighing each 20,000 pounds or more; Chickasha, Grady County: terminated 21 shipments—originated two shipments weighing each, 20,000 pounds or more; Duncan, Stephens County, 39 shipments terminated, 38 weighing less than 5,000 pounds each, and one weighing 20,000 pounds or more; Ft. Sill, Comanche County, 41 ship-

ments terminated, 38 weighing less than 5,000 pounds each, and three weighing 20,000 pounds or more; Lawton, Comanchee County: terminated 71 shipments, one weighing 6186 pounds—originated one shipments weighing less than 5,000 pounds; Fort Supply, Woodward County, one shipment weighing 10,500 pounds terminated; Woodward, Woodward County, eight shipments terminated, one weighing 11,150 pounds; Clinton, Custer County: terminated 10 shipments, one weighing 12,884 pounds—originated seven shipments weighing less than 5,000 pounds each—one additional shipment weighing 5622 pounds from Clinton Sherman Air Force Base; Guyman, Texas County, nine shipments terminated, one weighing 11,220 pounds.

As evidence of traffic originating or terminating south or west of Oklahoma and Texas the exhibit shows two shipments of lamps, and a duplicating machine from Chicago to Cimarron, Colo., and N. L. Tmps., Mex., one shipment of spark plugs from Fostoria, Ohio, to El Tors, Calif.; two shipments of doors, and angles from St. Louis to Corona, and Los Angeles, Calif., respectively; one shipment of plastic art from Baltimore, Md., to Albuquerque, N. M.; six shipments of transformers, dresses, castings, castings, jackets, and castings from Los Angeles to Kokomo, Ind., La Grange, Ill., Minneapolis, Minn., Elkhart, Ind., Chicago and St. Louis respectively; one shipment of advertising material from Hollywood to Watseka, Ill.; one shipment of meters from El Monte, Calif., to St. Louis; one shipment of tents from San Mateo, Calif., to Hannibal, Mo.; one shipment of toilet preparations from Phoenix, Ariz., to Franklin Park, Ill.; one ship-

ment of tableware from Pt. Gibson, Miss., to Plymouth, Minn.; and two shipments, one of calendars and the other unknown, from Shreveport, and Bogalusa, La., respectively to St. Louis.

The exhibit also shows three truckloads of carbide from Keokok, Iowa to Oklahoma, two to Oklahoma City and one to Enid.

A recap of the above exhibit for the months of July and December, 1962 introduced in evidence at the hearing, showed a total of 3669 shipments, weighing 6,146,281 pounds were handled. Of this total 163 shipments each weighed 10,000 pounds or over. The total weight was 3,832,198 pounds.

Another tabulation sponsored at the hearing showed that during the period from March 20, 1963 through September 1963 when Braswell Freight operated under temporary control the certificates here sought, it transported some 5,290 shipments weighing 7,247,846 pounds southbound from Chicago and St. Louis, and some 2,012 shipments, weighing 3,342,420 pounds northbound from Phoenix and Tucson, Ariz., Los Angeles, Calif., Oklahoma City and Tulsa, Okla., Dallas, El Paso, Ft. Worth, Houston, Odessa, San Antonio and Waco, Texas. Of the southbound shipments 176 each weighed 10,000 pounds or more. Northbound shipments weighing 10,000 pounds or more numbered 85, of which 25 and 54 shipments originated respectively at Oklahoma City and Tulsa.

An exhibit was sponsored at the hearing showing some additional shipments transported by the Shayler

Operation dating from January 2, 1962 to July 1, 1962, as well as shipments listed in the exhibit filed with the application. It was designed to show points in Illinois outside of the Chicago commercial zone, *supra*, and points in Oklahoma, outside Oklahoma City and Tulsa, to and from which the Shayler Operation had maintained direct service. Some 178 shipments with a total weight of 1,441,757 pounds were originated at the Illinois origins. Shipments and weight to the Oklahoma points, and from the Oklahoma points totaled respectively, 192 and 347 shipments and 2,372,363 and 6,945,839 pounds. An abstract of freight bills was also submitted at the hearing showing points of service at outlying points in Illinois and Oklahoma during operating under temporary authority by Braswell Freight.

Testimony as to the Shayler Operation was to the effect that (1) service was offered to all the area authorized to be served, (2) no attempt was made to limit or restrict operations as to territory or commodities, (3) about 95 percent of the traffic originating at outlying Illinois points originated on other carriers, and (4) direct service was provided to Addison, Alton, Aurora, Buda, Chicago Heights, Downers Grove, East Alton, Elk Grove Village, Elmhurst, Joliet, Rock Falls, Sycamore, Villa Park and Wheaton.

Evidence shows approximately 372 shipments originated, and 125 shipments terminated at outlying Illinois points. Particularizing there were 15 LTL and 13 TL shipments transported under the Shayler Operation from Alton and East Alton in Illinois and from points located in an area immediately adjacent to the

Chicago commercial area. Excluding one TL to Peoria, two LTL and seven TL shipments terminated in the area around Chicago. As supplemented at the hearing some 178 shipments were shown as originating at points to which the Shayler Operation maintained direct service. One TL shipment terminated at Peoria in Peoria County, and one LTL shipment weighing 5305 pounds, and one TL shipment originated respectively at Buda, in Burea County, and Rock Falls in Whiteside County. These points are located on the western border of the Shayler Rights in Illinois. Except for Chicago and St. Louis there was no substantial shipper[17] support for the maintenance of service from the Illinois origin points in the area described in footnote 16 above. Despite claims of offering service to all the area authorized to be served, it is admitted that 95 percent of the originated traffic at outlying points was by connecting carriers. It is manifest from the record that the straightened financial condition of the Shayler Operation dictated curtailment of the scope of service at least in Illinois. However, the evidence is persuasive that an effort was made to serve the Illinois area in the vicinity around the Chicago commercial zone, *supra*, and Alton and East Alton in the St. Louis area. Under the circumstances, the examiner concludes, and so finds, that except for traffic originating in the counties of Cook, DeKalb, DuPage, Kane, Lake, Madison, and Will Counties in Illinois, also any portion of Illinois in the St. Louis commercial zone, *supra*, the operating rights from points and places in Illinois described in certificate No. MC 70380

[17] A shipper at El Paso receives cosmetics from Lincoln, Ill.

are dormant and should be cancelled.

Testimony as to the Shayler Operation in Oklahoma was substantially the same as to the Illinois origin territory. It was likewise claimed that direct service was maintained to some 40 destinations and some 11 origins in Oklahoma. Eight of the origins are also listed as destinations.

Excluding Oklahoma City and Tulsa, evidence shows some 1089 shipments originated or terminated at outlying Oklahoma points in 73 of its 77 counties. As illustrated above shipments ranging from LTL. 5000 to 10,000 pounds, 10,000 to 20,000 pounds, and 20,000 or more pound lots were both picked up and delivered to points in an area bounded by Miami on the east, Fort Supply on the west, Ardmore on the south, and Ponca City on the north. The entire state is substantially blanketed. Evidence of record indicates that pick up, or delivery of shipments, and especially smaller shipments, to the extent such service was performed, was accomplished by combining the pick up or delivery with shipments of anything greater than about 3,000 pounds. This is clearly supported by the mosiac of the origin and destination of the shipments shown in the exhibit accompanying the application. Approval of the application was urged by shippers from Chicago, St. Louis and some from other points. A shipper at Sapulpa and a Chicago factory representative for the same firm urged approval. In contrast to service performed at the Illinois origins discussed heretofore, the evidence is convincing that service to and from outlying Oklahoma points was

rendered on a reasonably continuous and adequate basis consistent with the straightened financial condition of the Shayler Operation. Under the circumstances the examiner concludes and so finds that the territorial scope of the operating rights as to outlying origin and destination points in Oklahoma described in certificate No. MC 70380 are not dormant.

Transportation of carbide from Keokuk, Iowa, to Oklahoma points has been reasonably continuous and substantial for the period shown and the examiner so finds.

The evidence of record shows, and the examiner concludes and so finds, that service between Chicago and St. Louis and their commercial zones, on the one hand, and, on the other Tulsa and Oklahoma City, was rendered on a reasonably continuous and adequate basis consistent with the straightened financial condition of the Shayler Operation.

Since the Shayler Rights are general commodity, with exceptions, irregular route common carrier authority, and since the evidence of record shows that a variety of commodities for various shippers have been transported by the Shayler Operation consistent with its resources the examiner concludes and so finds that protestants other contentions as to dormancy are without merit.

New Service

Protestants' claim that approval of the transaction will create a new service for which no public need has been shown. Some of these protestants' urge that, if

it is found desirable in the public interest to approve the transaction, a restriction be imposed to prevent transportation between Chicago and St. Louis on the one hand, and, on the other Phoenix and Tucson, Arizona, and west coast points. Braswell Freight counters, that the record clearly shows, that Braswell Freight and the Shayler Operation have over the years. interchanged a substantial and continuous volume of traffic with each other and other connecting carriers.

The dormancy issue has been disposed of previously.

Principal points of interchange between the Shayler Operation and Braswell Freight has been at Tulsa and Oklahoma City. In the past some interchange has been conducted by the Shayler Operation with connecting carriers at Waurika, Okla.

In addition to the shipments to and from Oklahoma and Texas points shown in the exhibit accompanying the application, the following shipments are shown: three to California, one to Colorado, one to New Mexico, and one to Mexico; one from Arizona, one from Mississippi, and two from Louisiana. Three exhibits sponsored at the hearings showed interchange (1) between the Shayler Operation and 22 connecting carriers at Oklahoma City and Tulsa, (2) between the Shayler Operation and Braswell Freight, and (3) between Braswell Freight operating the Shayler Rights under temporary authority and 23 connecting carriers at Oklahoma City and Tulsa.

The first named exhibit covered a period of 60 days in 1962, in which the Shayler Operation delivered 463

shipments, weighing 573,846 pounds to 14 connecting carriers at Oklahoma City, and 232 shipments, weighing 94,367 pounds to eight connecting carriers at Tulsa. It received back 29 shipments, weighing 44,856 pounds from six connecting carriers at the former point, and 58 shipments, weighing 27,655 pounds from three connecting carriers at the latter point. Two shipments to New Mexico points are shown in June 1962.

Under the second named exhibit, interchange with Braswell Freight for September 1960, 1962, and January and February 1963 totaled some 1600 shipments, weighing 5,164,578 pounds at Oklahoma City and Tulsa for southbound movement, and 192 shipments, weighing 277,909 pounds, at those points for northbound movement. For the month of September 1960, it shows one shipment to California; five to Louisiana, and one to Arizona; 14 from El Paso, Texas; 19 from California points, and 11 from Arizona points.

Interchange under the third exhibit showed that Braswell Freight operating the Shayler Rights under temporary authority for the period April through September 1963, delivered to 16 carriers at Oklahoma City some 745 shipments weighing 432,067 pounds, and to seven carriers at Tulsa, some 167 shipments weighing 131,387 pounds, all of which were destined to Oklahoma and Texas points. It received back five shipments weighing 60,066 pounds, all destined to Chicago except one which was destined to Pittsburgh, Pa.

The record shows that interchange between the

Shayler Operation and Braswell Freight, and between those carriers and others has been substantial and continuous.

Moreover, the extent of the interchange, as shown by the record, between points on the Shayler Operation, and beyond, on the one hand, and, on the other, points in New Mexico, Arizona and California, while not large, has not been of such insufficient volume to warrant a finding that a new service would be instituted with respect to this traffic. Where, as here, there has been substantial interchange generally denial is not warranted because interchange in every direction and to every possible point is not shown. *D. C. Hall Company—Purchase—David C. Hall and D. C. Hall Transport, Inc.*, 70 M.C.C. 233.

The Shayler Operation has its roots in a "grandfather" application. Its tenure in business lends strength to a need to continue the business.

Seventy witnesses located at some 20 points on the Shayler Rights and on the lines of Braswell Freight and Braswell Motor, supported a need for a continuation of that service which had been provided in the past by a combination of the involved rights.

The examiner is of the opinion, and so finds that approval of the transaction would not create a new service.

Under the circumstances a restriction as requested by some of the protestants is unnecessary. See *Viking Frt. Co.—Control—Cook Truck Lines*, 58 M.C.C. 679.

Conversion of Irregular to Regular Rights

Protestants insist that it is incompatible to join an irregular route right with a regular route operation; that Braswell Freight cannot maintain the viability of the irregular character of the rights; that the evidence discloses that Braswell Freight has operated the Shayler Rights under temporary authority as regular route rights and that it proposes to continue on such a concept; and that approval of the transaction would be contrary to the public interest. Braswell Freight denies these charges and says it has in the past, and proposes in the future too, operate the Shayler Rights in conformity with standards laid down in *Transportation Activities of Brady Transfer & Storage Co., supra.*

The record shows that both the Shayler Operation, and the Braswell Freight operation under temporary authority has been more frequently over U. S. Highway 66 than any other route; the evidence shows other routes are also used. There is no evidence that the use of this particular route has become routinized. While U. S. Highways 66 and Interstate 44 are perhaps the shortest and best maintained there is a choice of routes between the termini of the Shayler Operation and it is presumed and expected that Braswell Freight will conduct the Shayler Operation in accord with its original character. The record before this examiner does not support protestants' contentions that the character of the Shayler Operation has under gone a change in character under temporary control by Braswell Freight. In this connection see *Stockpile—Purchase—*

Popkin, 50 M.C.C. 89, *Woolen—Purchase—Columbia Truck Exp.*, 49 M.C.C. 586, and *Garrett Freight Lines, Inc. v. Northern Transp. Co.*, 47 M.C.C. 707.

Tariffs and Rates

Much of the testimony at the hearing dwelled on the (1) rate structure maintained by the Shayler Operation and adopted by Braswell Freight, and (2) the rate structure maintained by Braswell Freight and Braswell Motor. Without reciting the various contentions of the parties it is only necessary to say here that the evidence shows that by and large those rates were published to meet rail competition. Moreover, the act contains adequate provisions for consideration of such matters presented in appropriate proceedings before the Commission. *Old Colony Forwarding Corp.—Purchase—Ryan*, 25 M.C.C. 693, 698.

Affect on Competing Carriers

Protestants' claim there is an abundance of service provided between the points involved in the transaction, and that there is no need for an additional carrier. According to them there has been no showing that existing service is inadequate, or any need for an additional carrier. Approval of the transaction, they conclude, will divert traffic from, and adversely affect, existing carriers, and disrupt the general competitive situation.

Braswell Freight points out that most of the protestants are large, and well established carriers, and that

by and large most of them have been unable to isolate any particular traffic that would be subject to diversion. In any event they have not shown what impact, if any, a loss of traffic would have on their financial condition. Despite protestants claims and apprehensions, applicant directs attention to the fact that all protesting carriers have enjoyed increases in revenue, tonnage and improved operating ratios over the period from 1959 through the first three quarters of 1963, a portion of the 1963 periods cover temporary operation of the Shayler Rights by Braswell Freight.

The record shows that loss of traffic to either the Shayler Operation, Braswell Freight, Braswell Motor, or the joint operation was more fancied than real. Eleven of the protestants had lost no traffic, as of the date of the hearing, and were unable to insolate any that would be subject to diversion. Traffic lost by applicants lower competitive rates was regained by protestants when the lower rates were met or cancelled. In most instances protestants did not elect to meet the lower competitive rates. Even though some of the supporting shippers testified they had diverted traffic to applicant's joint operation, they gave assurances, and it has been confirmed by protestants, that they were not giving all their traffic to applicants.

One supporting shipper asserted that the traffic he was routing over Braswell Freight was not diverted from any competing carrier, but on the contrary reflected an increase in his business. This increase in business is widespread due to the expansion in popula-

tion[18] in 1960 over 1950, of which official notice is taken.[19]

Protestants are securely established carriers earning substantial revenues and showing favorable earnings. The record contains no facts to support an inference of diversion of any substantial amount of traffic to applicant, nor estimates of such diversion, nor evidence as to the relationship between estimated diversion and profitability of protestants' operations. *McFodden Express, Inc.—Purchase— Bay State Motor Express Co.*, 75 M.C.C. 111, 127-128. Mere apprehension in the absence of showing as to just how much traffic protestants would lose or how their operations would be harmed, is entitled to little weight *United States Van Lines, Inc. — Purchase — Davis Transfer*, 80 M.C.C. 135, 144.

Unquestionably protestants will lose some traffic as a result of approval of the transaction. However, the competitive impact upon protestants, as established by this record does not appear to warrant disapproval of the application for this reason, and the examiner so concludes and finds.

Interest of Carrier Employees

The Central Conference of Teamsters,[20] and Team-

[18]In this connection it is noted from the official census, Bureau of Census, Department of Commerce, that substantial increases have occurred in the population of the States of Arizona, California, Illinois, Missouri, New Mexico, Oklahoma, and Texas in 1960 over 1950. Even since the 1960 census the United States population has increase by over 10 million.

[19]*Commercial Zones and Terminal Areas.* 46 M.C.C. 665 (676).

[20]Affiliated with International Brotherhood of Teamsters.

sters' Local Union No. 710, are hereinafter referred to as the union. It takes the position that the application should be denied on the ground that it is contrary to national labor and transportation policy and would adversely affect the employees of vendor and vendee, and inconsistent with the public interest.

The union represents certain former employees of the Shayler Operation who were engaged in dock work and line driving. These employees were covered by an agreement entered into between the Shayler Operation and the union for the period February 1, 1961 to and including January 31, 1964. This provided among other things that the agreement would be binding on the parties thereto, their successors, administrators, executives, and assigns, and, in the event an entire operation or individual run or runs were sold, transferred, or taken over by a sale, transfer, assignment, receivership, or bankruptcy proceeding, such operation would continue to be subject to the terms and conditions for the life thereof. In 1962 the Shayler Operation employed some 44 persons: 12 in Chicago, including three pick-up and delivery drivers; four in St. Louis, two in Tulsa, and 11 in Oklahoma City. Fifteen of the 44 employees were regular line drivers. Not included in this complement are two extra line drivers.

The employees of the Shayler Operation were terminated as of the close of business February 5, 1963, under circumstances related in the paragraph under "Background", *supra*.

On brief, the union reviewed the evidence presented

at the hearing. It points out that it is the collective bargaining agent for the employees of the Shayler Operation, and Braswell Freight although the latter has refused to bargain collectively. According to the union the Shayler employees are entitled to continuation of protection of the agreement under the above clause. The union argues that the Shayler Operation was actually a joint venture, and that the separation of identities of the three Shaylers, father, son and mother is a legal fiction since it has held out to the public as Warren G. Shayler Truck Line. By use of this device, the union alleges, that the seller, Clarinda K. Shayler hopes to extract a quarter of a million dollars from the Shayler Rights, free and clear of debts to creditors and wages owed to employees of the Shayler Operation, which are now relegated for relief to the bankruptcy court. Assuming that the Shayler Operation is the transferor rather than Clarinda K. Shayler, it alleges that the statement in Exhibit D-5 is false because the transferor had a full complement of employees on January 28, 1963 the date of the application.

On brief the union urges denial of the application, or in the alternative (1) require Braswell Freight to recognize and conform to the collective bargaining agreements now in effect between the Shayler Operation and the union, and (2) pay former Shayler employees employed by Braswell Freight, a monthly displacement allowance for a period of four years for any loss of income and benefits between the old and new employment, based on their average earnings for the year preceding such displacement, (3) pay dismissed

former Shayler employees either a monthly dismissal allowance equal to the aforementioned displacement allowance, or a lump sum separation allowance based on length of service, (4) compensate employees required to change residence as result of transfer for loss in sale of real estate, broken leases, or moving expenses, (5) grant full recognition of the seniority status of all former Shayler employees employed by Braswell Freight, and (6) adjudicate any dispute arising out of the application of the foregoing conclusions by arbitration.

Braswell Freight's position throughout has been that bare operating certificates are the only thing involved, that the purchase was made from the owner of the certificates who was not an operator, and that Braswell Freight was under no obligation to protect the employees of the Shayler Operation on the same basis as where a transaction involved taking over the operations of the vendor. Likewise its position has been that if the Commission found otherwise Braswell Freight would be guided by the Commissions direction.

Braswell Motor's operation west of El Paso, recognizes the union and is a party to a collective bargaining contract. Braswell Freight also had a contract with the union which expired at midnight January 31, 1961. Since that time it has operated on a non-union basis. Since December 1960 the union has been unsuccessful in its attempts to negotiate a collective bargaining agreement with Braswell Freight. Since April 23, 1962 a strike has been in effect by the union

against Braswell Freight. On August 12, 1963, the General Counsel of the National Labor Relations Board, on behalf of the Board, has asserted that Braswell Freight et al, refused to bargain collectively in good faith. Hearing was held on this complaint a short time prior to the instant hearing.

The issues are (1) whether or not this Commission should require Braswell Freight to recognize and conform to the collective bargaining agreements now in effect between the Shayler Operation and the Union, (2) whether or not the employees of the Shayler Operation who were discharged as of the close of business February 5, 1963 because of the cessation of the Shayler Operation were adversely affected by this transaction, and (3) if the employees were so adversely affected should terms of protection requested by the union be accorded.

With respect to the first issue, the Commission has taken the position that whether or not a union contract shall be binding upon subsequent purchases of the employers is a matter for determination by the courts rather than by this Commission *Baggett Transportation Co.—Purchase—Hunt Freight Lines, Inc.*, 87 M.C.C. 235.

In connection with the second issue, and at the outset, it should be pointed out that section 5(2)(c)(4) provides that in passing upon any proposed transaction under the provisions of section 5(2) the Commission, shall "give weight" to the interest of the carrier employees affected. *Midwest Busline Inc.—Purchase—American Busline Inc.*, 80 M.C.C. 681. The imposition

of employee protective conditions in cases involving unification of motor carriers is purely a matter of discretion with the Commission, whereas imposition of such protection is made mandatory by statute in section 5 cases involving unification of rail carriers. No. MC-F 8393, *Overnite Transportation Co.—Purchase—Rutherford Freight Lines, Inc.*, (not printed) decided July 31, 1964. There is no requirement, however, that they be held harmless whatever the circumstances. *Midwest—Purchase (Portion)—American*, 90 M.C.C. 173.

The financial difficulties of the Shayler Operation began about 1958. Purchase of a large quantity of motor vehicle equipment in 1961 apparently resulted in worsening the financial condition. It became unable to pay its insurance premiums. Lease rental of the Shayler Rights were already in arrears. Efforts were made to sell the entire business. Negotiations were entered into with Braswell Freight to sell the equipment and Shayler Rights for $350,000. After extended negotiations the sale of the equipment was dropped and a contract was entered into on January 28, 1963 to sell the Shayler Rights for $250,000. Because of the cancellation of the insurance premiums the Shayler Operation ceased on February 5, 1963. The motor vehicle equipment was recovered under conditional sales contracts, the employees were terminated, and the Shayler Rights were under contract of sale to Braswell Freight. Vendee sought, and was granted temporary authority to operate over the Shayler Rights which was commenced March 18, 1963.

Since Braswell Freight was involved in a labor dispute at that time it was only willing to accept the former employees of the Shayler Operation on a non-union basis. However, the record shows, and this is despite the breakdown in communication between the Shayler Operation and Braswell Freight, an employee of the former, a Mr. Heider was told by the latter at El Paso, prior to February 5, 1963, and before temporary control was granted that any employee of the Shayler Operation who wanted work could file an application which would be considered on a non-discriminatory basis. Several former employees of the Shayler Operation went to work for Braswell Freight and several others were offered employment but they refused to cross picket lines. Apparently only one former employee of the Shayler Operation was working for Braswell Freight at the time of the hearing. The record does not, however, indicate that any of the former employees are unemployed.

Braswell Freight reiterates that it will give employment to any former employee of the Shayler Operation if qualified. It says it will comply with the requirements of the National Labor Relations Board at all times insofar as bargaining is concerned, that it does not intend to conform until required by the Board so to do. This dispute is now before the Board. In this connection see *Burlington Truck Line v. United States*, 9 L Ed. 2d, 207, 218.

The record supports the conclusion that every action taken in the series of events leading up to the sale of the Shayler Rights to Braswell Freight, from the de-

claration of incompetency of the father in 1946 to the sale of those rights had the sanction of the courts, and where leasing of the Shayler Rights were concerned the action had Commission approval. There is no evidence of any union intervention in any of these numerous proceedings. It must be presumed in the absence of any affirmative showing to the contrary that the actions taken by the court and Commission were proper.

Except for the bare allegation that the relationship between the elder Shayler, his wife, and son is a legal fiction, there has been no probative evidence submitted supporting this charge.

The conclusion seems warranted that the former employees of the Shayler Operation were not adversely affected as a direct result of the purchase of the Shayler Rights by Braswell Freight under section 5, and that the provisions of section 5(2)(c)(4) are inapplicable.

The third issue need not be reached in view of the conclusion and finding of the examiner with respect to issue number two.

The main thrust of the union position is that the application be denied. How denial of the application would aid the former employees of the Shayler Operation, particularly those which the union is obligated to protect, is not understood. The Shayler Operation was in financial straights due to its inability to attract necessary tonnage to support its fiscal requirements. The former proprietor is bankrupt. The seller is a

housewife, without the experience to conduct a trucking operation and without necessary capital if she had the experience. Nor is there any evidence in the record that she would resume the operation if the application be denied. To deny the transaction would impair, if not actually destroy, the ability of the Shayler Rights to form the basis for, and generate any employment potential. Approval of the transaction, on the other hand, will insure the ability of those operating rights to aid employment. Certainly the public interest, insofar as it touches the labor community, would not be served by disapproval of the transaction.

Discussion

Approval of the transaction will open up to Braswell Freight as local service points Chicago and St. Louis, and in conjunction with Braswell Motor, afford single line service from those points to the various Texas, New Mexico, Arizona and California points served by Braswell Motor. The management ability of Braswell Freight coupled with the extension of territorial coverage will afford the shipping public more single line capacity needed to meet the productive requirements of our growing nation and will serve the public interest. Moreover the shipping public which has used the Shayler Rights in the past are assured of there continuance.

No fixed charges are involved.

The examiner concludes and so finds that the transaction, to the extent herein indicated, is consistent with the public interest and should be approved.

All requested findings of fact, and conclusions of law, made by the parties at the hearing or on brief have been considered, and except to the extent adopted below, have either been found inappropriate or are overruled.

All of the requested findings of fact and conclusions of law of applicants are adopted, except No. 29 which is adopted in part, and rejected in part. It is rejected in part because all of the operating rights from points and places in Illinois described in No. MC 70380, except from points and places in the counties of Cook, De Kalb, Du Page, Kane, Lake, Madison, and Will Counties in Illinois, also any portion of Illinois in the St. Louis commercial zone, *supra*, have been found to be dormant and required to be cancelled as a condition of approval of the transaction.

All of the requested findings and conclusions of ICX are rejected, except Nos. 1 and 3 which are adopted. Nos. 2 and 7 are adopted in part and rejected in part. They are adopted to the extent that certain of the authority from points and places in the State of Illinois, herein described and delineated, have been found dormant.

All of the requested findings and conclusions of General, Navajo, and Roadway are rejected, except No. 1 which is adopted in part and rejected in part. It is adopted to the extent that certain of the authority from points and places in the State of Illinois herein described and delineated, have been found dormant.

Ultimate Findings and Order

In No. MC-F 8358, the examiner finds that the purchase by Braswell Motor Freight Lines, Inc.,[21] of the operating rights of the Estate of Warren G. Shayler, Deceased, from Clarinda K. Shayler, Individually and as Executrix and sole devisee of said estate, and acquisition by J. V. Braswell of control of the operating rights through the purchase, upon the terms and conditions set forth herein, which terms and conditions are found to be just and reasonable, constitute a transaction within the scope of section 5(2)(a) and will be consistent with the public interest, and that, if the transaction is consummated, Braswell Motor Freight Lines, Inc.[21] will be entitled to operate under the rights confirmed in No. MC 70380, MC 70380 Sub 1, and MC 70380 Sub 2, which rights are herein authorized to be unified with rights otherwise confirmed in it and to be embraced in a certificate to be issued in its name with duplications eliminated, subject to the condition that all of the operating rights from points and places in Illinois described in No. MC 70380 have herein been found to be dormant, and are to be cancelled, except from points and places in the Counties of Cook, De Kalb, Du Page, Kane, Lake, Madison and Will Counties in Illinois, also any portion of Illinois in the St. Louis commercial zone *supra*.

In Finance Docket No. 22543, the examiner finds that it should be dismissed.

Premises considered, it is the ORDER of the Hearing Examiner, that:

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[21] Successor in interest to Braswell Freight Lines, Inc.

(1) Finance Docket No. 22543 should be, and, it is hereby dismissed.

(2) The purchase by Braswell Motor Freight Lines, Inc., El Paso, Texas, of the operating rights of the Estate of Warren G. Shayler, Deceased, from Clarinda K. Shayler Individually and as Executrix and sole devisee of said estate, acquisition by J. V. Braswell of control of the operating rights through the purchase, be, and they are hereby approved and authorized, subject to the terms and conditions herein set forth.

If the parties to the transaction herein authorized desire to consummate same, they shall (1) promptly take such steps as will insure compliance with sections 215, 217 and 221(c) of the Interstate Commerce Act and with the rules, regulations, and requirements prescribed thereunder; and (2) confirm in writing to this Commission, immediate after consummation has actually taken place.

If the authority herein granted is exercised, Braswell Motor Freight Lines, Inc., shall submit for consideration sworn statement and one copy thereof, showing all expenditures made, by dates, or to be made, in connection with the transactions authorized, including the consideration, legal and other fees, commissions, witness fees, and any other cost incidental to the transactions, the assets acquired and the liabilities assumed, indicating the account number and title to which each item has been, or is to be, debited or credited.

The authority herein granted shall not be exercised

before the date of service of a notice or order stating that this recommended order has become the order of the Commission.

Unless the authority herein granted is exercised within 90 days from the date of service of such notice or order, this order shall be of no further force and effect.

Effective with consummation of the transaction herein authorized, or 90 days from the date of service of said notice or order, whichever first occurs, the temporary authority granted by the order of February 25, 1963, as extended by the order of July 17, 1963, for temporary operation of the operating rights of the Estate of Warren G. Shayler, Deceased, from Clarinda K. Shayler, Individually and as Executrix and sole devisee of said estate, shall be of no further force and effect.

The recital herein of balance sheet and other financial data shall not be construed as approving accounting methods which have been followed or expenditures represented thereby.

By the Commission, James F. Perrin, Hearing Examiner.

Dated at Washington, D. C. this 10th day of December, A. D. 1964.

HAROLD D. McCOY,

Secretary

(SEAL)

APPENDIX D

CARRIER OPERATING REPORTS SHOWING REVENUE, TONNAGE, AND OPERATING RATIO

Add 000 to all Columns except Operating Ratio

CARRIERS		Revenue	Tonnage	Operating Ratio
Be-Mac Transport Company	1959	6008	255	94.3
	1960	5962	236	98.3
	1961	6559	242	91.7
	1962	7054	267	91.5
1st Qtr.	1963	1734	65	95.2
2nd Qtr.	1963	1829	70	91.7
3rd Qtr.	1963	1931	74	90.5
Campbell Sixty-Six Express	1959	15800	598	90.6
	1960	16662	629	93.3
	1961	18028	648	91.5
	1962	18331	637	92.3
1st Qtr.	1963	4384	151	97.3
2nd Qtr.	1963	4909	172	89.5
3rd Qtr.	1963	5123	177	92.4
Consolidated Forwarding	1959	7300	257	96.1
	1960	7433	251	98.3
	1961	8316	274	93.9
	1962	9083	300	94.8
1st Qtr.	1963	2268	74	94.8
2nd Qtr.	1963	2468	81	92.7
3rd Qtr.	1963	2457	78	92.9
Consolidated Freightways, Inc.	1959	78390	4630	96.7
	1960	99863	4866	99.1
	1961	86793	4907	97.0
	1962	85215	5217	98.9
1st Qtr.	1963	28520	1190	103.3
2nd Qtr	1963	30058	1162	98.8
3rd Qtr.	1963	30176	1311	95.0

CARRIERS		Revenue	Tonnage	Operating Ratio
Denver Chicago Trucking Co.	1959	39704	621	91.8
	1960	40592	638	90.3
	1961	42259	654	90.1
	1962	43838	672	91.1
1st Qtr.	1963	10720	162	93.6
2nd Qtr.	1963	11340	167	90.1
3rd Qtr.	1963	11865	174	86.6
East Texas Motor Freight Lines	1959	16117	467	92.2
	1960	15712	452	95.1
	1961	17483	487	90 9
	1962	19157	530	91.3
1st Qtr.	1963	4891	135	94.0
2nd Qtr.	1963	5301	147	90.7
3rd Qtr.	1963	5480	152	91.3
Gillette Motor Transport	1959	6636	227	89.1
	1960	6548	222	97.4
	1961	7146	242	97.3
	1962	8003	276	94.3
1st Qtr.	1963	1939	67	89.5
2nd Qtr.	1963	2118	73	94.2
3rd Qtr.	1963	2165	70	94.5
Illinois-California Express	1959	15705	290	88.5
	1960	25266	640	93.1
	1961	26046	546	92.6
	1962	27434	564	92.6
1st Qtr.	1963	6805	133	97.7
2nd Qtr.	1963	7218	143	94.2
3rd Qtr.	1963	7892	156	93.4
Lee Way Motor Freight Lines	1959	12678	464	89.7
	1960	12205	445	98.8
	1961	16148	533	96.7
	1962	16435	539	95.8
1st Qtr.	1963	3984	131	98.5
2nd Qtr.	1963	4359	147	94.9
3rd Qtr.	1963	4540	149	98.1

CARRIERS			Revenue	Tonnage	Operating Ratio
Missouri Consolidated—See Knaus Truck Lines for 1959 and 1960		1961	4044	135	111.7
		1962	4290	126	88.3
	1st Qtr.	1963	1256	36	91.1
	2nd Qtr.	1963	1404	37	88.5
	3rd Qtr.	1963	1329	33	85.8
Navajo Freight Lines		1959	26571	578	91.2
		1960	27870	582	97.7
		1961	28820	636	95.3
		1962	30248	609	97.2
	1st Qtr.	1963	7028	124	98.9
	2nd Qtr.	1963	7601	136	96.2
	3rd Qtr.	1963	8201	167	94.3
Pacific Intermountain Express		1959	62517	2993	94.4
		1960	58304	2704	97.2
		1961	60215	2570	94.3
		1962	65499	2721	94.0
	1st Qtr.	1963	16063	666	97.2
	2nd Qtr.	1963	16909	689	93.6
	3rd Qtr.	1963	18380	763	93.4
Ringsby Truck Lines		1959	16422	335	98.7
		1960	17163	379	97.0
		1961	19041	400	95.0
		1962	20772	438	95.3
	1st Qtr.	1963	4964	104	95.9
	2nd Qtr.	1963	5517	110	95.2
	3rd Qtr.	1963	5638	111	95.8
Roadway Express		1959	65510	1543	93.1
		1960	70719	1639	92.2
		1961	78106	1748	91.9
		1962	88716	1929	90.6
	1st Qtr.	1963	20389	440	93.8
	2nd Qtr.	1963	22638	489	89.3
	3rd Qtr.	1963	22536	480	89.3

CARRIERS		Revenue	Tonnage	Operating Ratio
Southwestern Transportation Co.	1959	7416	333	91.1
	1960	7205	323	93.7
	1961	7148	290	95.6
	1962	7984	298	98.9
1st Qtr.	1963	1913	71	99.5
2nd Qtr.	1963	2135	79	94.8
3rd Qtr.	1963	2280	85	96.6
Texas-Arizona Motor Freight	1959	6902	154	88.8
	1960	7316	161	96.4
	1961	6808	145	92.8
	1962	7081	144	95.5
1st Qtr.	1963	1813	37	94.5
2nd Qtr.	1963	1833	37	94.8
3rd Qtr.	1963	1891	36	95.2
Transcon Lines	1959	19347	355	90.8
	1960	22570	452	94.9
	1961	23978	460	90.8
	1962	26519	470	87.1
1st Qtr.	1963	6792	113	88.8
2nd Qtr.	1963	7669	123	85.6
3rd Qtr.	1963	8126	128	84.3
Viking Freight Company	1959	14313	511	94.3
	1960	14308	518	97.1
	1961	15545	545	94.9
	1962	17774	605	96.6
1st Qtr.	1963	4330	145	99.8
2nd Qtr.	1963	4714	156	93.5
3rd Qtr.	1963	4834	158	93.6
Voss Truck Lines	1959	2405	77	95.4
	1960	2227	73	98.8
	1961	2384	79	92.6
	1962	2779	100	95.5
1st Qtr.	1963	700	25	111.8
2nd Qtr.	1963	795	29	100.1
3rd Qtr.	1963	846	22	86.7

CARRIERS		Revenue	Tonnage	Operating Ratio
Watson Brothers Transportation Company	1959	41097	1128	96.6
	1960	38139	1030	100.4
	1961	50039	1376	98.3
	1962	48697	1226	103.5
1st Qtr.	1963	9973	255	105.6
2nd Qtr.	1963	9092	208	99.8
3rd Qtr.	1963	9365	183	96.1
Western Truck Lines	1959	12686	391	97.0
	1960	13202	388	100.4
	1961	13900	395	99.4
	1962	14933	405	99.3
1st Qtr.	1963	3826	103	91.9
2nd Qtr.	1963	3841	105	96.1
3rd Qtr.	1963	4022	101	97.3
Wilson Truck Co.	1959	11394	354	93.6
	1960	11035	342	95.4

(Included with Watson Bros. for 1961, 1962, and 1963)

Source: Carrier Reports, Annual and Quarterly.

APPENDIX E

COMPARATIVE REVENUES, TONNAGES AND OPERATING RATIOS OF PROTESTANT CARRIERS FOR 1962, 1963, AND 1964

Add 000 to all Columns except Operating Ratio

CARRIERS		Revenue	Tonnage	Operating Ratio
Be-Mac Transport Company	1962	7054	267	91.5
	1963	7365	278	91.7
	1964	8032	306	92.2
Campbell Sixty-Six Express	1962	18331	637	92.3
	1963	19362	664	92.6
	1964	20941	708	93.0
Consolidated Forwarding	1962	9083	300	94.8
	1963	9543	309	95.2
	1964	9928	324	97.4
Consolidated Freightways, Inc.	1962	85215	5217	98.9
	1963	117423	4933	98.7
	1964	124922	4913	95.3
Denver Chicago Trucking Co.	1962	43838	672	91.1
	1963	45150	667	90.9
	1964	48481	687	89.7
East Texas Motor Freight Lines	1962	19157	530	91.3
	1963	20901	579	92.1
	1964	22828	640	91.3
Illinois-California Express	1962	27434	564	92.6
	1963	29305	577	95.3
	1964	31159	594	94.0

CARRIERS		Revenue	Tonage	Operating Ratio
Lee Way Motor Freight Lines	*1962	20382	694	96.5
	1963	21699	680	95.3
	1964	23979	768	94.4
Missouri Consolidated	1962	4290	126	88.3
	1963	5308	139	87.1
	1964	6396	164	75.1
Navajo Freight Lines	1962	30248	609	97.2
	1963	30497	538	96.4
	1964	31654	488	99.0
Pacific Intermountain Express	1962	65499	2721	94.0
	1963	68036	2833	95.1
	1964	69579	2833	93.8
Ringsby Truck Lines	1962	20772	438	95.3
	1963	21651	432	95.4
	1964	23215	444	94.8
Roadway Express	1962	88716	1929	90.6
	1963	101243	2067	89.6
	1964	109660	2224	90.0
Southwestern Transportation Co.	1962	7984	298	98.9
	1963	8507	319	96.4
	1964	9093	338	95.4
Texas-Arizona Motor Freight	1962	7081	144	95.5
	1963	7314	147	95.9
	1964	7427	150	95.1
Transcon Lines	1962	26519	470	87.1
	1963	30303	479	84.4
	1964	32359	486	84.4
Viking Freight Company	1962	17774	605	96.6
	1963	18513	612	96.4
	1964	19338	630	98.0

*Combined with Lee Way Motor Freight of Indiana

CARRIERS		Revenue	Tonage	Operating Ratio
Watson-Wilson Transportation Company	1962	48697	1226	103.5
	1963	37615	837	99.9
	1964	33730	703	100.4
Western-Gillette	*1962	25775	784	96.7
	1963	26789	778	96.5
	1964	29516	702	95.9
A.T. & S.F. Railway Company	1962	507347	—	79.1
	1963	513113	—	80.5
	1964	533524	—	80.2

*Combined for Western, Gillette and Voss

Source: Carrier Reports, Annual, 1962, 1963 and 1964.